

12947
No. ~~12974~~

United States
Court of Appeals
For the Ninth Circuit.

CALIFORNIA VEGETABLE GROWERS, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

AUG 17 1951

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. **CLERK**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

ERNEST A. TOLIN,
United States Attorney,

CLYDE C. DOWNING,
ROBERT K. GREAN,
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Los Angeles 12, Calif.

United States District Court, Southern District of
California, Central Division

No. 11423—Civil

CALIFORNIA VEGETABLE GROWERS, a Cor-
poration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes Now the plaintiff, California Vegetable Growers, by Schauer, Ryon & McMahon and Alfred D. Haines, as its attorneys, and alleges:

First Cause of Action

I.

The action arises under Section 1346 (a)(2), United States Code, Title 28, as hereinafter more particularly appears.

II.

At all times herein mentioned plaintiff was, and is, a corporation duly organized, existing, and authorized to do business under and by virtue of the laws of the State of California.

III.

That on or about the 13th day of December, 1946, in compliance with law, plaintiff sold and delivered to defendant, represented by and acting through the United States Army, and [2*] more specifically,

*Page numbering appearing at foot of page of original Certified Transcript of Record.

represented by and acting through the Quartermaster's Market Center, Los Angeles, California, three (3) carloads of celery, comprising one thousand four hundred ninety (1,490) crates of said commodity.

IV.

That the defendant then promised to pay Two Dollars and Thirty Cents (\$2.30) per crate for the said celery, or a total of Three Thousand Four Hundred Twenty-Seven Dollars (\$3,427.00).

V.

That said sale and delivery of said celery was made in accordance with an oral understanding and agreement arrived at by and between plaintiff and defendant at Guadalupe, California.

VI.

That, in accordance with said oral agreement and understanding, said 1,490 crates of celery were packed and shipped by plaintiff to the Property Officer, Quartermaster Market Center, Seattle, Washington, after said celery was first inspected at shipping point and found acceptable to defendant's agent and representative.

VII.

That, in accordance with said oral agreement and understanding, and at the direction and request of defendant, said celery was specially wrapped and packed in a manner unacceptable in commercial channels, and shipped to Seattle, Washington, via the Pacific Fruit Express Company on commercial

bills of lading which were to be converted, at destination, to Government bills of lading.

VIII.

That said celery arrived at Seattle, Washington, in due course, but said defendant did then and there refuse, and at all times since has refused, and now refuses to pay the agreed purchase price, or any part thereof, upon the alleged grounds that [3] said celery did not pass inspection at destination, to wit: Seattle, Washington.

IX.

That, by reason of the non-commercial wrap and pack of said celery, plaintiff was only able to sell said celery for freight charges plus the sum of Five Hundred Ninety-One Dollars and Two Cents (\$591.02).

X.

That prior to the filing of this complaint plaintiff exhausted all of its administrative remedies applicable to the subject matter hereof, in an attempt to recover the amount herein sued upon, and that this action is brought only after plaintiff was unsuccessful in recovering said amount by said methods.

Second Cause of Action

I.

As a second, separate and independent cause of action plaintiff realleges paragraphs I, II, III, V, VI, VII, IX and X of its first cause of action, and by such reference to said paragraphs makes them a part hereof.

II.

That said celery was reasonably worth the sum of \$3,427.00 but that said defendant refused to pay said sum, or any part thereof, when said celery arrived at Seattle, Washington, its point of destination, and at all times since has and now refuses to pay said sum, or any part thereof, upon the alleged grounds that said celery did not pass inspection at destination.

Wherefore, plaintiff prays judgment against defendant in the sum of \$3,427.00 less \$591.02, or, namely, the sum of Two Thousand Eight Hundred Thirty-Five Dollars and Ninety-Eight Cents (\$2,835.98), for costs of suit herein, and for such other and further relief as the Court deems just and proper in the premises.

SCHAUER, RYON &
McMAHON, and

ALFRED D. HAINES,

By /s/ ALFRED D. HAINES,

Attorneys for Plaintiff. [4]

State of California,

County of Santa Barbara—ss.

Leo T. McMahon, being first duly sworn, deposes and says:

That he is an officer, to wit: Vice President, of California Vegetable Growers, a corporation, the plaintiff in the above-entitled action, and makes this verification on behalf of said plaintiff; that he has read the foregoing complaint and knows the contents

thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes the same to be true.

/s/ LEO T. McMAHON.

Subscribed and sworn to before me this 11th day of April, 1950.

[Seal] /s/ MARTHA E. BLANCO,
Notary Public in and for the County of Santa
Barbara, State of California.

My commission expires July 6, 1951.

[Endorsed]: Filed April 12, 1950. [5]

[Title of District Court and Cause.]

ANSWER

Comes Now defendant United States of America, by Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Paul Fitting, Assistant United States Attorneys, for the Southern District of California, and in response to the Complaint herein alleges:

Answer to Plaintiff's First Cause of Action

I.

Defendant admits the allegations of Paragraphs I and II of the complaint.

II.

Answering Paragraphs III and IV of the com-

plaint, defendant admits that on or before December 13, 1946, the Quartermaster Market Center of the United States War Department at Guadalupe, California, requested bids for 1490 crates of fresh U. S. No. 1, 55#, celery for export, to be packed in a specified fashion, for shipment to Seattle, Washington, and to be subject to inspection for condition at such destination. Defendant further admits that plaintiff [6] submitted a bid to furnish such celery at a price of \$2.30 per crate, or a total price of \$3,427.00. The Quartermaster Market Center of the United States War Department accepted such bid on the condition that the celery be inspected for condition, and accepted, at destination, and thereafter issued three War Department Purchase Orders embodying the terms of said request, bid and acceptance.

III.

Answering Paragraphs V and VI, defendant admits that during the period from December 14, 1946, to December 16, 1946, and as a result of said request, bid and acceptance, plaintiff packed in three freight cars 1490 crates of celery and shipped said crates to the Property Officer, Quartermaster Market Center, Seattle, Washington. Defendant further admits that said celery was inspected by the United States Department of Agriculture, acting for defendant herein, at Lompoc, California, the point of origin of the shipments, and that said shipments were not rejected at that time.

IV.

Answering Paragraph VII, defendant admits that

the War Department Purchase Orders covering the celery provided, "Each stalk to be individually wrapped in parchment paper; wrapper to cover complete shank of stalk. Crate to be wired, strapped at each end for export." Defendant further admits that the celery was to be shipped to Seattle, Washington on commercial bills of lading, which were to be converted to Government Bills of Lading at destination.

V.

Answering Paragraph VIII, defendant admits that said celery arrived at Seattle, Washington on or about December 23 and 24, 1946; that said celery was inspected on said dates by the United States Department of Agriculture, acting for defendant herein, and found to be not in the condition called for by said request for bids, acceptance, and the purchase orders covering said celery, and further that no part of the \$3,427 price of said celery has been paid because of the condition of said celery.

VI.

Answering Paragraph IX, defendant has no information or belief upon [7] the subject of the allegations of Paragraph IX sufficient to enable it to answer them, and, placing its denial on that grounds, denies the allegations of Paragraph IX of the complaint.

VII.

Answering Paragraph X, defendant admits that the Comptroller General of the United States has

disallowed plaintiff's claims to the amount sued for hereunder.

VIII.

Further answering, defendant denies each and every allegation of the First Cause of Action of said complaint not hereinbefore specifically admitted.

Answer to Second Cause of Action

I.

Answering Paragraph I, defendant realleges Paragraphs I, II, III, IV, VI, and VII of its Answer to First Cause of Action, as fully as if they were set forth herein.

II.

Answering Paragraph II, defendant admits that said celery arrived at Seattle, Washington on or about December 23 and 24, 1946, that said celery was inspected on said dates by the United States Department of Agriculture, acting for defendant herein, and found to be not in the condition called for by said request for bids, acceptance, and purchase orders covering said celery, and further that no part of the \$3,427 price of said celery has been paid because of the condition of said celery.

III.

Further answering, defendant denies each and every allegation of the Second Cause of Action of said complaint not heretofore specifically admitted.

First Separate Defense

As a first and independent defense, defendant alleges as follows:

I.

On or about December 13, 1946, the Quartermaster Market Center of the United States War Department requested bids for 1490 crates of fresh, [8] U. S. No. 1, 55#, matured celery, to be packed in a specified manner and for export, to be shipped to the Property Officer, Quartermaster Market Center, Seattle, Washington, and to be subject to inspection for condition, and acceptance, at Seattle, Washington.

II.

On or about December 13, 1946, plaintiff submitted a bid to furnish such celery at a price of \$2.30 per crate, or a total price of \$3,427, and the Quartermaster Market Center of the United States War Department accepted such bid on the condition that the celery be inspected for condition at destination and accepted there, and issued three War Department Purchase Orders covering such celery.

III.

Plaintiff packed and shipped from Lompoc, California, to the Property Officer, Quartermaster Market Center, Seattle, Washington, in response to said acceptance, 1490 crates of celery, which crates of celery arrived at Seattle on or about December 23rd and 24th, 1946.

IV.

On or about December 23rd and 24th, 1946, said

celery was inspected on behalf of the defendant by inspectors of the United States Department of Agriculture, and found to be not in the condition called for, but to be off condition and suffering from blight and decay, not suitable for export, and not U. S. No. 1 grade celery.

V.

Promptly upon learning of such inspection, the Quartermaster Market Center of the United States War Department caused notice thereof to be given plaintiff, rescinded the agreement, and requested that plaintiff receive back said celery. Plaintiff thereupon took possession again of said celery.

Second Separate Defense

I.

As a second and independent defense, defendant alleges: [9]

Defendant realleges the allegations of Paragraphs I through IV of its First Separate Defense as fully as if set forth herein.

II.

Plaintiff warranted that the celery in said 1,490 crates so shipped was fresh U. S. No. 1, matured, 55#, celery, suitable for export.

III.

Said celery was not as warranted.

Third Separate Defense

As a third and independent defense, defendant alleges as follows:

I.

Defendant incorporates herein Paragraphs I through IV of its First Separate Defense as fully as if set forth herein.

II.

Plaintiff herein failed to comply with the terms of said request for bids, bid, and acceptance, and of the War Department Purchase Order, in that plaintiff failed to deliver 1490 crates of U. S. No. 1, fresh, matured, 55#, celery, suitable for export.

Wherefore, defendant herein prays that the plaintiff take nothing by its complaint; that defendant herein be awarded its costs of suit, and for such other relief as may be appropriate and just in the premises.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Asst. United States Attorney,
Chief, Civil Division.

PAUL FITTING,
Asst. United States Attorney.

/s/ PAUL FITTING,
Asst. United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 14, 1950. [10]

[Title of District Court and Cause.]

STIPULATION OF FACTS AND ORDER

It Is Hereby Stipulated by and between plaintiff, California Vegetable Growers, through its counsel, Alfred D. Haines and Schauer, Ryon & McMahon, and defendant, United States of America, through its counsel, Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Paul Fitting, Assistant United States Attorneys, for the Southern District of California, as follows:

I.

Plaintiff, California Vegetable Growers, was at all the dates mentioned in this stipulation, and now is, a corporation duly organized, existing, and authorized to do business under the laws of the State of California.

II.

On or before December 13, 1946, the Quartermaster Market Center of the United States War Department at Guadalupe, California, orally requested bids for 1490 crates of fresh, U. S. No. 1, 55# celery for export. Said bids specified the manner of wrapping, [12] packing and icing, the wrap and pack specified being of a type not used in commercial channels.

III.

On December 13, 1946, plaintiff submitted a bid to furnish such celery at a price of \$2.30 per crate, or a total of \$3,427.00, delivery to be "F.O.B. origin," (however, defendant contends delivery to be "F.O.B. origin, but subject to inspection at destination") and the Quartermaster Market Cen-

ter of the United States War Department accepted such bid.

IV.

Thereafter, 500 crates of such celery were packed in Car SFRD 3086. These crates were inspected by an inspector of the United States Department of Agriculture, at Lompoc, California, between 2:00 p.m., December 14, 1946, and 9:00 a.m., December 16, 1946, acting on behalf of the defendant, United States of America. A copy of Inspection Certificate 65049 covering such inspection is attached hereto as a part of this stipulation.

V.

Thereafter, 490 crates of such celery were packed in Car PFE 41017. These crates were inspected by an inspector of the United States Department of Agriculture, at Lompoc, California, between 3:30 p.m., December 14, 1946, and 10:30 a.m., December 16, 1946, acting on behalf of the defendant, United States of America. A copy of Inspection Certificate 65048 covering such inspection is attached hereto as a part of this stipulation.

VI.

Thereafter, 500 crates of such celery were packed in Car PFE 45854. These crates were inspected by an inspector of the United States Department of Agriculture, at Lompoc, California, between 1:00 p.m., December 14, 1946, and 3:30 p.m., December 14, 1946, acting on behalf of the defendant, United States of America. A copy of Inspection Certificate 65025 covering such inspection is attached hereto as a part of this stipulation. [13]

VII.

It was part of the purchase agreement that: "Each stalk to be individually wrapped in parchment paper: wrapper to cover complete shank of stalk. Crate to be wired, strapped at each end for export," and that the celery was so wrapped and packed and shipped to Seattle, Washington, F.O.B., on commercial bills of lading, which were to be converted to Government bills of lading at destination, in accordance with the request and direction of the defendant.

VIII.

The three above carloads of celery were thereafter transported by rail from Lompoc, California, to Seattle, Washington.

Car SFRD 3086 left Lompoc, California, on December 16, 1946, and arrived at Seattle, Washington, at 3:50 p.m. on December 23, 1946, as shown by PFE's record of arrival, a copy of which it attached hereto as a part of this stipulation.

Car PFE 41017 left Lompoc, California, on December 16, 1946, and arrived at Seattle, Washington, at 3:50 a.m. on December 23, 1946, as shown by PFE's record of arrival, a copy of which is attached hereto as a part of this stipulation.

Car PFE 45854 left Lompoc, California, on December 14, 1946, and arrived at Seattle, Washington, at 1:35 a.m. on December 21, 1946, as shown by PFE's record of arrival, a copy of which it attached hereto as a part of this stipulation.

IX.

At 11:30 a.m., on December 24, 1946, the celery

contained in Car SFRD 3086 was inspected at Seattle, Washington, by an inspector of the United States Department of Agriculture, acting on behalf of the defendant herein. A copy of such Inspection Report No. D-43196 is attached hereto and made a part of this stipulation.

At 2:15 p.m., on December 27, 1946, the celery contained [14] in Car SFRD 3086 was again inspected at Seattle, Washington, by an inspector of the United States Department of Agriculture at the request of the plaintiff herein, and the result of said inspection is set forth in Inspection Certificate B-46844, a copy of which is attached hereto and made a part of this stipulation.

X.

At 10:30 a.m., on December 24, 1946, the celery contained in Car PFE 41017 was inspected at Seattle, Washington, by an inspector of the United States Department of Agriculture, acting on behalf of the defendant herein. A copy of such Inspection Certificate No. D-43195 is attached hereto and made a part of this stipulation.

At 3:15 p.m., on December 27, 1946, the celery contained in Car PFE 41017 was again inspected at Seattle, Washington, by an inspector of the United States Department of Agriculture at the request of the plaintiff herein, and the result of said inspection is set forth in Inspection Certificate B-46845, a copy of which is attached hereto and made a part of this stipulation.

XI.

At 2:40 p.m., on December 23, 1946, the celery

contained in Car PFE 45854 was inspected at Seattle, Washington, by an inspector of the United States Department of Agriculture, acting on behalf of the defendant herein. A copy of such Inspection Certificate No. D-43243 is attached hereto and made a part of this stipulation.

This car was again inspected at 10:15 a.m. on December 26, 1946, by an inspector of the United States Department of Agriculture at the request of the plaintiff herein, and the result of such inspection is set forth in Inspection Certificate B-46839, a copy of which is attached hereto and made a part of this stipulation. [15]

On December 23, 1946, there were typed three War Department purchase orders by the Quartermaster Market Center referring to the three cars above described. Copies of these orders are attached hereto and made a part of this stipulation. These purchase orders were thereafter mailed to plaintiff herein. It is understood that plaintiff's position is that: said purchase orders are not binding upon the plaintiff, and that they do not constitute the agreement of the parties, and further, that they do not correctly set forth said agreement.

XIII.

Defendant herein refused to accept delivery of any of the celery shipped in the above cars, and has paid no part of the price thereof.

XIV.

Subsequent to the rejection by defendant, plaintiff sold said celery for freight charges plus the sum of \$591.02.

XV.

The parties by this stipulation do not stipulate that all the terms of the purchase orders are set forth herein, and it is the intention of all the parties to leave open for proof at the time of trial what may have been the terms and provisions agreed upon by the parties orally and/or otherwise, and particularly the provisions as to inspections, except as herein specified. Both parties also reserve the right to present additional evidence at time of trial in reference to the matters herein stipulated to and/or matters not covered by this stipulation.

Dated: January 25th, 1951.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division.

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

/s/ ALFRED D. HAINES,
SCHAUER, RYON &
McMAHON,
Attorneys for Plaintiff. [16]

Order

It is so ordered this 29th day of January, 1951.

/s/ JAMES M. CARTER,
U. S. District Judge. [17]

COPY

Form FDA-10a (California)
(Superseding FPI-30)UNITED STATES DEPARTMENT OF AGRICULTURE
STATE OF CALIFORNIA,
DEPARTMENT OF AGRICULTURE

65049

INSPECTION CERTIFICATE

This certificate is issued in compliance with the regulations of the Secretary of Agriculture governing the inspection of various products pursuant to the act making appropriations for the United States Department of Agriculture and the California Fruit and Vegetable Certification Legislation, and is admissible as prima facie evidence in all courts of the United States and of California. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

Inspection point Imperial, Calif. Kind of car Refrigerator Car initials WJH and number 200

Inspection begun 2:00 P.M., Dec. 14, 1936 Completed 3:00 A.M., December 16, 1936
(Hour, date) (Hour, date)

Applicant California Vegetable Growers Address Santa Barbara, Calif.

Shipper Same Address Same

I, the undersigned, on the date above specified made personal inspection of samples of the lot of products herein described, and do hereby certify that the quality and/or condition, at the said time and on said date, pertaining to such products, as shown by said samples, were as stated below:

Condition of car: Hatch covers closed, plugs in, lockers empty.

Products: CELERY, French type; Manufactured 500 wire bound 16 inch diameter stainless PICAFUSON #1 - #55.

Loading: Through load, 3 to 5 wide, 3 to 6 high. Crushed top 1 in.

Pack: Mostly fairly tight, some slack. Stalks wrapped.

Size: Irregular.

Quality and condition: Celery fresh, crisp and well trimmed. Stalks green solid. Tops fresh and green. Hearts fairly well formed. Defects range from 7% to 20%, averaging approximately 12%; consisting mostly of worm damage or mechanical injury. No decay.

Grade: Averages approximately 80% U.S. No. 1 quality, Green.



L. H. HARRIS

Inspector.

COPY

FD-106 (California)
 (Revising FFI-30)

UNITED STATES DEPARTMENT OF AGRICULTURE
 STATE OF CALIFORNIA,
 DEPARTMENT OF AGRICULTURE

65048

INSPECTION CERTIFICATE

This certificate is issued in compliance with the regulations of the Secretary of Agriculture governing the inspection of various products purchased in the and the supervision for the United States Department of Agriculture and the California Fruit and Vegetable Certification Legislation and is admissible as prima facie evidence in all courts of the United States and of California. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

Inspection point Imperial, Calif. Kind of car Refrigerator Car initials and number WPA 4017

Inspection begun 1:30 P.M., Dec. 14, 1936 Completed 10:31 A.M., December 16, 1936
 (Hour, date) (Hour, date)

Applicant California Vegetable Growers Address Santa Barbara, Calif.

Shipper Same Address Same

I, the undersigned, on the date above specified made personal inspection of samples of the lot of products herein described, and do hereby certify that the quality and/or condition, at the said time and on said date, pertaining to such products, as shown by said samples, were as stated below:

Condition of car: Hatch covers closed, bins in, bunkers empty.

Products: CELERY, Pascal types; Manifested by 50 wire bound 16 inch crates
Standard LADO #1 - A55 and RICHARD #1 - A55.

Loading: Through load, 3 to 5 wide, 3 to 6 high. Crushed top 10%.

Stalks: Mostly fairly tight, some slack. Stalks wrapped.

Size: Irregular.

Quality and condition: Celery fresh, crisp and well trimmed. Stalks green color.
 Tops fresh and green. Hearts fairly well formed.
 Defects range from 5% to 20%, averaging approximately 12%; consisting mostly
 of worm damage or mechanical injury. No decay.

Grade: Averages approximately 80% U.S. No. 1 quality. Green.



L. Martinez

Inspector.

Z-2442

COPY

In (for California)
(Use PP-100)

UNITED STATES DEPARTMENT OF AGRICULTURE

STATE OF CALIFORNIA,
DEPARTMENT OF AGRICULTURE

65025

INSPECTION CERTIFICATE

This certificate is issued in compliance with the regulations of the Secretary of Agriculture governing the inspection of various products pursuant to the act of Congress for the United States Department of Agriculture and the California Fruit and Vegetable Certification legislation, and is admissible as prima facie evidence in all courts of the United States and of California. This certificate does not entitle holder to comply with any of the regulatory laws enacted by the United States Department of Agriculture or the Federal Food and Drug Administration.

Inspected at Los Angeles, Calif. Kind of car refrigerator Car initials and number PTA 19974
 Inspection begun 1:00 P.M., Dec. 14, 1946 Completed 1:30 P.M., December 14, 1946
 (Hour, date) (Hour, date)
 Agent California Vegetable Growers Address Route 10, Burbank, Calif.
 Inspector W. H. H. H. Address W. H. H. H.

I, the undersigned, on the date above specified, made personal inspection of samples of the lot of products herein described, and do hereby certify that the lot or condition, at the said time and on said date, pertaining to such products, as shown by such samples, were as stated below:

Kind of car: Batch 10000 0-00, 10000 0-00, 10000 0-00.

Contents: CELERY, French type; Modified 500 - 16 inch wire bound crates
Shipped 1000 0-1 - 1946.

Weight: Through load, 3 to 7 wide, 4 to 6 high. Crushed top 100.

Mostly fairly tight, many slack. Stalks individually wrapped.

Irregular - Stalks generally clipped.

Quality and condition: Very fresh, crisp and well trimmed. Stalks generally
green color. Tops fresh and green. Hearts fairly well formed.
Defects range from 5% to 25%, averaging approximately 14%; consisting of
some damage, remainder mostly mechanical injury or poorly formed hearts.
Heavy.

Averages approximately 55% U.S. No. 1 quality. Green.



T. H. H. H.

Inspector.

PACIFIC FRUIT EXPRESS COMPANY

REQUEST FOR CONFIRMATION OF DIVERSION ORDER OR FOR DISPOSITION OF SHIPMENT

Calif Fruit Bros
Guadalupe

Guadalupe Calif

Gentlemen:

1. Refers to telephone conversation 1457 M date, 19 1946
with Bill May:
2. Kindly mail confirmation of your telephone conversation requesting diversion of car
to _____
3. Please furnish immediate advice as to disposition of car _____

now on track at _____, or advise this office
in that connection.Remarks: RD 3086 arrived Seattle 350 pm Dec 23, 1946J McCutchen
(Name)

12-25-46W

FORM 25-1-PPE

PACIFIC FRUIT EXPRESS COMPANY

REQUEST FOR CONFIRMATION OF DIVERSION ORDER OR FOR DISPOSITION OF SHIPMENT

Calif Fruit Bros
GuadalupeFile 5039
Guadalupe 12-26-46

Gentlemen:

1. Refers to telephone conversation 4567 M date, 19 1946
with Mr Brown:
2. Kindly mail confirmation of your telephone conversation requesting diversion of car
to _____
3. Please furnish immediate advice as to disposition of car _____

now on track at _____, or advise this office
in that connection.Remarks: OTE 41017 Lompoc 12/16 arrived Seattle 350am
and refused account conditionJ McCutchen
(Name)

PACIFIC FRUIT EXPRESS COMPANY

REQUEST FOR CONFIRMATION OF DIVERSION ORDER OR FOR DISPOSITION ~~SHIPMENT~~*Calif Dept Agr**FL 5-5023**Shadalsup**Shadalsup 12-26-46*

Gentlemen:

1. Refers to telephone conversation with *Mr. Dunn*;

*11a**sets*

M. _____, 19____

2. Kindly mail confirmation of your telephone conversation requesting diversion of car.

to _____

PYE 45854

3. Please furnish immediate advice as to disposition of car.

now on track at *Seattle*
in that connection.

, or advise this office

Remarks:

*Arrived 135am 2/24 at refused account**condition**E. J. McCutcheon*

(Name)

UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON STATE DEPARTMENT OF AGRICULTURE

D-43196

INSPECTION CERTIFICATE

Inspected, at the date above specified made personal inspection of samples of the lot of products herein described, and do hereby

point *Seattle Wash.* Hour *11:30 A.* M. Date *Dec 24, 1946*
Q.M. Market Center Address *Seattle Wash.*
Address

certified, at the date above specified made personal inspection of samples of the lot of products herein described, and do hereby

R.D. 3086 *Lot 8259* Destination *Seattle Wash.*

show number and kind containers, brands, marks, pack, size, quality condition, grade:

banits Count 500 min brand crates Pearl type Cherry
ch, crisp, tops mostly green; some turning yellow to
tan. Blight ranges 8 to 15% orange 11/4%
4% decay

marks. This inspection restricted to determine only
in R.D. 3086 at Quarter Market Cold Storage
Seattle Wash.

01/25 350

Quantities quoted are from Q. M. C. Form No. 206
and not necessarily actual quantities delivered

E. D. Watkins

Inspector

FDA-403
(Using FPI-1)

ORIGINAL

UNITED STATES DEPARTMENT OF AGRICULTURE

WASHINGTON, D. C. 20250
Office of Production & Marketing Admin.

INSPECTION CERTIFICATE

This certificate is admissible in all Courts of the United States as prima facie evidence of the truth of the statement therein contained. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

B- 46844
B- 46844

Market Seattle, Wash. Date Dec. 27, 1946 Hour 2:15 P.M.

California Vegetable Growers Address Guadalupe, Calif.

(Applicant)

Same Address Same

Q M M O Address Seattle, Wash.

That in accordance with instructions issued by the Secretary of Agriculture pursuant to authority conferred upon him by law, I inspected the samples and on the date stated above, samples of the following lot of products, and that the quality and/or condition as shown by said samples, at said on said date, were as stated below:

N.P.R.R.

Kind S F R D 3 0 8 6 of car Refrigerator Where Inspected Team Track

on of car: Hatch covers closed, plugs in, bunkers full of ice.

Inspected and Pascal type C E L E R Y in wirebound crates stenciled
Distinguishing marks: "Richardson QM-55". Manifested as 500 crates.

on of load and containers: Through load, each end, 5 rows, 6 layers, irregular
loading between doors. 4 to 18 inches crushed ice over top
and crushed ice also at sides of load.

on of pack: Tightly tight. Each stalk wrapped.

nature of product: Bottom layer 32°, top layer 32° F.

Generally fairly uniform. Stalks generally clipped to 16 inches. Average midrib
length 6 to 11 inches, mostly 6 to 9 inches.

Mostly fairly good

Stalks are generally well developed, fairly good to good/heart formation,
n, fairly good to good green color, well trimmed. Grade defects average well
in tolerance.

Stock is mostly fresh and crisp, tops mostly good green color, few turning
yellow. Damage from blight averages 1%. Some tops slightly affected with
blight not affecting grade. 1% fresh worm injury with live worms present.
1% damage from discoloration following bruising. Decay in tops ranges in
samples from 15% to 20%, in many samples none; averages 8%, chiefly Bacterial
rot, mostly in initial stages, many advanced and many following blight. Decay
on main branches averages 2%.

Now falls to grade U.S.No.1 Green only account decay, but now contains
approximately 85% U.S.No.1 Green quality; 10% decay.

Inspection and certificate restricted to product and lading between, and in
4 stacks nearest each side of, doors.



Fee \$5.00

Expenses

Total \$5.00

D. M. Bard *W. M. Brooks*
D. M. Bard W. M. Brooks Inspector.

Address 228 Federal Office Bldg. Seattle,
Wash.

PLEASE REFER TO THIS CERTIFICATE BY NUMBER AND MARKET

UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON STATE DEPARTMENT OF AGRICULTURE

D-431957

INSPECTION CERTIFICATE

made prima facie evidence in courts of Washington and the United States but does not relieve holder from compliance with laws.

Point Seattle, Wash.
Q.M. Market Center

Hour 10:30 a.m. Date Nov 24, 1946Address Seattle, Wash.Address ✓

designated, on the date above specified made personal inspection of samples of the lot of products herein described, and do hereby certify the quality and/or condition, at the said time and on said date, pertaining to such products, as shown by said samples, were as follows:

Trailer, semitrailer. License LA 8860 Destination Seattle, Wash.

Show number and kind containers, brands, marks, pack, size, quality, condition, grade:

1000's count (500) 112: binned half cts. Caring
crisp type mostly green. Some turning to
red. Defect ranges to 10% averaging 16%
any ranges to 10% averaging 5%.

This inspection restricted to down spray only
at Q.M. Cold Storage plant.
24, 1946.

470-#350

Quantities quoted are from Q. M. C. Form No. 506
and not necessarily actual quantities delivered.

Campbell Kennedy
Inspector

UNITED STATES DEPARTMENT OF AGRICULTURE

FOOD ADMINISTRATION

Production and Marketing Adm.

INSPECTION CERTIFICATE

This certificate is admissible in all Courts of the United States as prima facie evidence of the truth of the statement therein contained. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

B- 46845

B- 46845

Market Seattle, Wash.

Date Dec. 27, 1946

Hour 3:15 P.M.

California Vegetable Growers

Address Guadalupe, Calif.

Same

Address Same

Q M M C

Address Seattle, Wash.

This certificate is issued pursuant to instructions issued by the Secretary of Agriculture pursuant to authority conferred upon him by law. It is issued on the date stated above, samples of the following lot of products, and that the quality and/or condition as shown by said samples at the time and date, were as stated below:

Kind of car Refrigerator Where N.P.R.R.
Inspected Team Track

Number F F E 4 1 0 1 7
Hatch covers closed, plugs in, ice approximately 6 inches from top in each bunker.

Inspected and Pascal type C E L E R Y in wirebound crates stenciled "Noma" and "Richardson QMI A 35" or "Richardson QMI A 55". Manifested as 500 crates.

Through load, each end, 5 rows, 6 layers, irregular loading between doors. Crushed ice at sides and 4 to 24 inches crushed ice over top of load.
Generally tight. Each stalk wrapped.

Temperature of product: Bottom layer 33°, top layer 33° F.

Stalks generally clipped to 16 inches, average midrib length to 11, mostly 6 to 9 inches.

Generally well developed, fairly good to good, mostly fairly good heart formation, clean, fairly good to good green color, well trimmed. 5% grade defects, mostly poorly trimmed, poor heart formation or cutworm injury.

Generally fresh and crisp, tops generally green. 1% fresh worm injury with live worms present. Some tops slightly affected with blight not affecting grade. Many samples show approximately 10% decay affecting tops, many of which are following blight, in most samples no decay in tops, averages 4%. Less than 1% decay affecting lower main branches. Decay is chiefly Bacterial Soft Rot initial stages.

Now fails to grade U. S. No. 1 Green only account decay but now contains approximately 90% U. S. No. 1 Green quality; 5% decay.

Inspection and certificate restricted to product and lading between, and in 4 stacks nearest each side of, doors.



Fee \$5.00

Expenses

Total \$5.00

D. M. Hurd W. M. Brooks
D. M. Hurd W. M. Brooks Inspector.

Address 228 Federal Office Bldg. Seattle, Wash.

PLEASE REFER TO THIS CERTIFICATE BY NUMBER AND MARKET

UNITED STATES DEPARTMENT OF AGRICULTURE
WASHINGTON STATE DEPARTMENT OF AGRICULTURE

D-43243I

INSPECTION CERTIFICATE

made prima facie evidence in courts of Washington and the United States but does not relieve holder from compliance with

point Seattle Wash Hour 5:45 P.M. Date June 1, 1935
Q. M. Market Lutes Address Seattle Wash
Address _____

inspected, on the date above specified made personal inspection of samples of the lot of products herein described, and do hereby certify that the quality and/or condition, at the said time and on said date, pertaining to such products, as shown by said samples, were as

License A-8751 Destination Seattle Wash

number and kind containers, brands, marks, pack, size, quality, condition, grade):

Wire-bound crates. Parcel type. 10 lbs. each. 10 lbs. mostly green, some turning yellow to yellowish brown. From 4 to 17 in. in diam. circles of rings. Sides irregular, most of the rings from 5 to 7 in. in diam. approximately 7% in diam. in

Inspection restricted to driveway and back yard side of driveway of Car PFF-45854
M. J. J. Storage

Quantities quoted are from Q. M. C. Form No. 308
and not necessarily actual quantities delivered

June 1, 1935

50

F. C. Anderson
Inspector

Form FDA-404
(Revision: FPI 1)

UNITED STATES DEPARTMENT OF AGRICULTURE

U.S. FOOD ADMINISTRATION
OFFICE OF DISTRIBUTION

Production & Marketing Adm.

ORIGINAL

INSPECTION CERTIFICATE

This certificate is admissible in all Courts of the United States as prima facie evidence of the truth of the statement therein contained. This certificate does not excuse failure to comply with any of the regulatory laws enforced by the United States Department of Agriculture or the Federal Food and Drug Administration.

B- 46839
B- 46839Market Seattle, Wash. Date Dec. 26, 1946 Hour 10:15 A.M.California Vegetable Growers Address Guadalupe, Calif.(Applicant)
California Vegetable Growers Address Guadalupe, Calif.Q. A. K. C. Address Seattle, Wash.

I certify that in accordance with instructions issued by the Secretary of Agriculture pursuant to authority conferred upon him by law, I inspected, on and on the date stated above, samples of the following lot of products, and that the quality and/or condition as shown by said samples, at said time and date, were as stated below:

Initials F F E 4 5 8 5 4 Kind Refrigerator Where Milwaukee Railroad
Number F F E 4 5 8 5 4 of car Refrigerator inspected Hold track.

Condition of car: Hatch covers closed, plugs in, ice in bunkers to within 1-1/2 feet of top.

Products inspected and distinguishing marks: Pascal type C E L E R Y in wirebound crates stenciled "LADD MI A56." Manifested as 500 crates.

Condition of load and containers: Through load, in each and 4 layers, 4 to 9 rows, doorway being irregular. From 6 to 10 inches crushed ice over approximately 1/2 of top of pack: Generally fairly tight. Each stalk layer crates.

individually wrapped.

Temperature of product: Bottom layer 33°, top layer 35° F.

Generally fairly uniform. Stalks generally clipped to 16 inches. Average stalk length 6 to 11 inches, mostly 6 to 9 inches.

Quality: Stalks are generally well developed, generally with good heart formation. Generally clean, generally good green color and well trimmed. Grade defects well within tolerance.

Stock free from decay is fresh and crisp. Tops mostly green, few turning yellow. Damage from discoloration following bruising averages 1%. Decay condition: in tops ranges from 0% to 35%, averages approximately 20%, chiefly Bacterial Soft rot, mostly in initial stages, many advanced. In many stalks decay in tops is following Blight. Decay in lower main branches ranges in samples from 4% to 12%, in some samples none, averages 5%, chiefly Watery Soft rot, mostly in initial stages.

Remarks: Now fails to grade U. S. No. 1 Green only account decay, but now contains approximately 70% U.S. No. 1 Green quality; 25% decay.

Remarks: Inspection and certificate restricted to product and lading between, and upper 2 layers of 4 stacks each side of, doors.



Fee \$5.00
Expenses _____
Total \$5.00

H. M. Brooks
W.M. Brooks

Inspector.

Address 228 Federal Office Bldg., Seattle, Wash.

PLEASE REFER TO THIS CERTIFICATE BY NUMBER AND MARKET

ARMY DEPARTMENT PURCHASE ORDER

is authorized by the First War Power Act, 1941 (Public No. 254, 77th Congress) and No. 648 (Dec. 27, 1941) and the Act of July 2, 1940 (Public No. 703, 76th Congress) by the Act of June 8, 1943 (Public No. 630, 77th Congress).

Quartermaster Market Center
111 W. Seventh St., P.O. Box 6480
Los Angeles 55, California

and address; also factory address if required)

California Vegetable Growers,
P. O. Box 777
Guadalupe, Calif.

Property Officer
Quartermaster Market Center
Seattle, Wash.
c/o "Palisann" Pier #36,
Seattle, Wash.

DATE 13 Dec 46		CONTRACT NO. (if any)
SHEET NO. 1	T.O. OF SHEETS 2	ORDER NO. LOS A 8259
Above divided sheets may appear on all pages and pages related to this order.		

REQUESTION NO.
45-064-66-47

DIRECTIVE NO.
Seattle No. 1192

PAYMENT WILL BE MADE BY FINANCE OFFICE, U.S. ARMY, AT:
Los Angeles, Calif.

INVOICE FOR PAYMENT WILL BE MAILED TO:
111 W. 7th St., P.O. Box 6480
Los Angeles 55, Calif.

The receipt and services to be obtained by this instrument are authorized by, and for the purposes set forth in, and are chargeable to the following accounts, the available balances of which are sufficient to cover the cost thereof:

707-6135 P 121-08
A 216/70504 S 04-089

PRICE WITH YOURS AND SPECIAL QUOTATION/ACCOMMODATION OF 13 December 1946
WITH THE FOLLOWING ON THE TERMS SPECIFIED ON BOTH SIDES OF THIS PAGE AND ON THE ATTACHED SHEETS, IF ANY, INCLUDING
P.B. Freight:

PRESENTING INVOICES OR VOUCHERS, AND OF PACKING, MARKING, AND SHIPPING, SHALL DIVIDED HEREIN, EXCEPT AS OTHERWISE DIRECTED BY THE CONTRACTING OFFICER. Ship on	DISCOUNT TERMS
1 E/ to be converted to Gov't B/L at destination	none

DELIVERIES 23 December 1946	INSPECTION POINTS Inspection and acceptance at destination
--------------------------------	--

SUPPLIES OR SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
CELERY, 55#, matured, tight pack, (27500) 86% U.S. No. 1	500	crt	2.30	\$1,150.00

Each stalk to be individually wrapped in parchment paper, wrapper to cover complete shank of stalk - crate to be wired, strapped at each end for export and Marked: Ft. Richardson - QM-A55.

Unit price includes tax ice/ Re-iced at GERMER
Federal State inspected

The above commodity is subject to acceptance in accordance with Q.M.Mkt. Ctr. Operating Manual, Par. 3005.

Carlot No. 3770 ROUTING: SP MP
Shipped 12/16/46 in Car No. SPED 3086

Contractor shall give prepaid notice of shipment to Q.M.Mkt. Ctr., Seattle Port of Embarkation, Bldg. 13, 1049 South Alaskan Way, Seattle 4, Wash. As prescribed in Special Condition No. 6 attached.

F.B.O. Guadalupe

TOTAL				
UNITED STATES OF AMERICA				
BY <i>K. W. Alexander</i>				
K. W. ALEXANDER, 1st Lt., QMC				
CONTRACTING OFFICER				

ARMY DEPARTMENT PURCHASE ORDER

As authorized by the First War Power Act, 1917 (Public No. 144, 40th Congress) and the Act of July 2, 1917 (Public No. 174, 40th Congress) and the Act of June 8, 1942 (Public No. 564, 77th Congress)

Quartermaster Market Center
111 W. Seventh St., P.O. Box 8480
Los Angeles 36, California

and address also primary address if required

California Vegetable Growers
P.O. Box 777
Owensdale, California

Property Officer
Quartermaster Market Center
Seattle, Washington
c/o "Palisade"
Pier #36, Seattle, Washington

DATE 12 Dec 46		CONTRACT NO. (if any)	
SHEET NO. 1	NO. OF SHEETS 2	ORDER NO. LUE A 8260	
CROSS-REFERENCE NO. 45-064-66-47		CROSS-REFERENCE NO. Seattle No. 1193	
PAYMENT WILL BE MADE BY FINANCE OFFICE, U.S. ARMY, AT: Los Angeles, California			
INVOICE FOR PAYMENT WILL BE MAILED TO: 111 W. 7th St., P.O. Box 6480 Los Angeles 55, California			
The weights and services to be obtained by this instrument are authorized by one of the programs described in and are classified by the contract to determine the probable business of this are subject to cover the cost thereof: 707-6135 P 111-08 A 216/70504 S 04-089			

MADE WITH YOUR FURNISHED/OWN QUOTATION/WEIGHTS/DESCRIPTIONS OF 13 December 1946
WITH THE FOLLOWING ON THE TERMS SPECIFIED ON BOTH SIDES OF THIS PAGE AND ON THE ATTACHED SHEETS, IF ANY, INCLUDING
P.A. Origin

TO FURNISH WEIGHTS OR VOLUMES, AND OF PACKING, MARKING, AND SHIPPING, SHALL
BE MADE HEREIN, EXCEPT AS OTHERWISE DIRECTED BY THE CONTRACTING OFFICE.
Com'l B/L to be converted to Gov't B/L at Destination

DATE 23 December 1946
REMARKS - Inspection and acceptance at Destination.

SUPPLY OR SERVICE	QUANTITY	UNIT	UNIT PRICE	AMOUNT
CERLEY, 55%, Fresh, matured, tight pack, (21175) 80% U.S. No. 1	385	Crt.	2.30	\$ 885.50
MARKED: Ft. Richardson-QM-455				
CERLEY, 55%, Fresh, matured, tight pack, (3630) U.S. No. 1	66	Crt.	2.30	151.80
MARKED: LAND-QM-456				
CERLEY, 55%, Fresh, matured, tight pack, (21145) U.S. No. 1 (26950)	39	Crt.	2.30	89.70
MARKED: BOMB-QM-435				
Each stalk to be individually wrapped in parchment paper; wrapper to cover complete shank of stalk. Crate to be wired, tapped at each end for Export.				
Unit price includes top ice. To be re-loaded at Berber.				
Federal-State Inspected.				
The above commodities are subject to acceptance in accordance with Q.M. Market Center Operating Manual, Paragraph 3005				
CARLOT NO. 3771 - ROUTING: SP MP				
Shipped 12/16/46 in Car No. FWE-41017				
The Contractor shall give prepaid notice of shipment to: Q.M. Market Center, Seattle Port of Embarkation Bldg. 13, 1049 So. Alaskan Bay, Seattle 4, Wash. As prescribed in special condition No. 6 attached				TOTAL \$1,127.00
K. W. ALEXANDER, 1st Lt., Q.M.C. CONTRACTING OFFICER				

18 Typed - 12/23/46 gw

25 94871

A-1

EXHIBIT B

13 Dec 46		DO. TRACT NO. (11 reg)	
1		2	
ISSUATION NO. 45-064-66-47		ORDER NO. LOC A 8261	
Quartermaster Market Center 111 W. Seventh St. P.O. Box 6430 Los Angeles 55, California		Above described commodity shall remain the property of the Government until it is sold or otherwise disposed of by the Government.	
California Vegetable Growers P.O. Box 717 Bakersfield, California		PAYMENT WILL BE MADE BY FINANCE OFFICER, U.S. ARMY, AT Los Angeles, California	
Property Officer Quartermaster Market Center Seattle, Washington c/o "Falsiana" Box 456, Seattle, Washington		FAVOR FOR PAYMENT WILL BE ISSUED TO: 111 W. 7th St., P.O. Box 6480 Los Angeles 55, California	
		The supplies and services to be obtained by this instrument are authorized by one of the persons authorized by law and are necessary to the efficient conduct of the operations of the United States Army. The supplies and services to be obtained by this instrument are to be used for the purpose of the operations of the United States Army.	
13 December 1946		707-6135 P 111-08 + 216/70504 S 04-089	
YOUR VERBAL QUOTATION/UNDERSTANDING OF THE FOLLOWING ON THE TERMS SPECIFIED ON BOTH SIDES OF THIS PAGE AND ON THE ATTACHED SHEET, IF ANY, ENCLOSURE			
Or gln		DISCOUNT TERMS	
B/L to be converted to Gov't B/L at Destination.		None	
23 December 1946		INSPECTION FORMS - Inspection and Acceptance at Destination.	
SUPPLIES OR SERVICES		QUANTITY	UNIT
ELETRY, 554, Fresh, matured, tight pack, (27500) B. & U.S. No. 1 each stalk to be individually wrapped in parchment paper; wrapper to cover complete shank of stalk. Crate to be wired, strapped at each end for Export.		500	Crt.
MARKS: LADU-DNT-456		UNIT PRICE	AMOUNT
Unit price includes top ice. To be received at Harbor.		2.30	\$1,150.00
Federal State Inspected.			
The above commodity is subject to acceptance in accordance with U.S. Market Center Operating Manual, Paragraph 3005.			
LOT NO. 3772 - ROUTING: SP NP			
Shipped 12/14/46 in Car No. FFE-45854			
The Contractor shall give prepaid notice of shipment to: Quartermaster Market Center, Seattle Port of Embarkation, Bldg. 13, 949 South Alaskan Way, Seattle 4, Washington.			
B O - QUADALUPE			
		TOTAL	
		UNITED STATES OF AMERICA	
		BY <i>[Signature]</i> K. E. ALEXANDER, 1st Lt., U.S.A.C.	
		CONTRACTING OFFICER	

Typed - 12/23/46 gw

28 94891

Die in der Tabelle angegebenen Werte sind die Mittelwerte der Messungen der verschiedenen Proben. Die Standardabweichungen sind in Klammern angegeben. Die Werte in der letzten Spalte sind die Werte der Messungen der verschiedenen Proben.

W. H. PERKINSON AND LEONARD W. CARR, in the Department of Chemistry, University of Illinois, Urbana, Illinois 61801

[illegible]

(b) If supplies are fresh fruits and/or vegetables, the manufacturer shall be subject to compliance in accordance with QuickScan® Market Center (QuickScan Market, Inc., #950).

(c) If supplies are produce, fruits and/or vegetables, cooperative shall be subject to the following:

(13) French literature is of the lowest trip and I have prepared, instead of a French literature course, a course in the history of the French language. The result shall be a course in the history of the French language and in accordance with a general historical and literary background. The result shall be a course in the history of the French language and in accordance with a general historical and literary background. The result shall be a course in the history of the French language and in accordance with a general historical and literary background.

12. DATE OF RECEIPT - If the applicant specified in this column are used, the F-100 will need the same identification number and the number of all previous.

15. **SHADES OF GREEN**—Unique colorfastness. It is the only color of this category now on all sizes of pleated skirts. The colorfastness is guaranteed with the new weight. are wrapped up and in boxes or packages. The colorfastness is guaranteed with the new weight. please at Home, Retail and Dept. Stores will be shipped with the new weight.

[illegible]

(b) Eggs to be shipped in less than sealed condition. If such eggs are imported at all times, the Government will accept the supplier at destination at the Government's sole discretion. The Government will accept eggs, as determined by inspection at destination, if the supplier certifies that the eggs are sealed, as determined by inspection at destination, at the time of importation.

(c) Processed eggs purchased for export to other countries are inspected at the origin. The supplier at destination at a grade not lower than S.M. is required to furnish a health inspection at destination.

only one of the specified basins are used. Rather, each supplier will be applicable to all of the specified basins.

[illegible]

45.16 This item specified Needle to Be: Needles, Frim. The following shall apply Paragraph 5-16. Under the heading PACKING of QC Test/Spec Specification QC 80 111, dated 13 December 1966, shall be changed as follows:

This product shall be packed in foil cellophane or equivalent material, meeting the following requirements:

- (a) The material shall be impermeable to moisture, oxygen, and light.
- (b) The material shall be strong enough to withstand the normal handling of the product.
- (c) The material shall be strong enough to withstand the normal handling of the product.
- (d) The material shall be strong enough to withstand the normal handling of the product.
- (e) The material shall be strong enough to withstand the normal handling of the product.
- (f) The material shall be strong enough to withstand the normal handling of the product.
- (g) The material shall be strong enough to withstand the normal handling of the product.
- (h) The material shall be strong enough to withstand the normal handling of the product.
- (i) The material shall be strong enough to withstand the normal handling of the product.
- (j) The material shall be strong enough to withstand the normal handling of the product.
- (k) The material shall be strong enough to withstand the normal handling of the product.
- (l) The material shall be strong enough to withstand the normal handling of the product.
- (m) The material shall be strong enough to withstand the normal handling of the product.
- (n) The material shall be strong enough to withstand the normal handling of the product.
- (o) The material shall be strong enough to withstand the normal handling of the product.
- (p) The material shall be strong enough to withstand the normal handling of the product.
- (q) The material shall be strong enough to withstand the normal handling of the product.
- (r) The material shall be strong enough to withstand the normal handling of the product.
- (s) The material shall be strong enough to withstand the normal handling of the product.
- (t) The material shall be strong enough to withstand the normal handling of the product.
- (u) The material shall be strong enough to withstand the normal handling of the product.
- (v) The material shall be strong enough to withstand the normal handling of the product.
- (w) The material shall be strong enough to withstand the normal handling of the product.
- (x) The material shall be strong enough to withstand the normal handling of the product.
- (y) The material shall be strong enough to withstand the normal handling of the product.
- (z) The material shall be strong enough to withstand the normal handling of the product.

[illegible]

16. Condition numbered 6 of this contract is modified by striking "one" and inserting "three" and "be 352 pounds per square inch dry and 390 pounds square inch wet."

of feeding at destination, the transportation driver is responsible for ensuring that goods are loaded and unloaded properly.

Endorsed : Filed January 30, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause came on regularly for trial on March 6, 1951, before the Honorable James M. Carter, Judge presiding, sitting without a jury, Alfred D. Haines, and Schauer, Ryon & McMahon, by Alfred D. Haines and Robert W. McIntyre having appeared as attorneys for the plaintiff, and Ernest A. Tolin, United States Attorney, Clyde C. Downing and Robert K. Grean, Assistant U. S. Attorneys, by Robert K. Grean, Assistant U. S. Attorney, having appeared as attorneys for the defendants; and oral and documentary evidence was introduced on behalf of both the plaintiff and the defendant and received by the Court; and the Court having heard all of the testimony and having examined the documentary evidence offered by the parties, and the cause having been submitted for decision, and the Court being fully advised in the premises, hereby makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

The Court finds as follows:

I.

That this is a suit of a civil nature brought against the United [42] States of America, and jurisdiction of this Court is invoked under the provisions of Title 28, Section 1346(a)(2) U.S.C., and that this Court has jurisdiction to hear and determine the within matter.

II.

That at all times mentioned in the complaint the plaintiff, California Vegetable Growers, was and is a corporation duly organized, existing and authorized to do business under and by virtue of the laws of the State of California, and whose principal place of business is in the City of Santa Barbara and within the jurisdiction of this Honorable Court.

III.

That on or about December 13, 1946, a Civilian Marketing Specialist, Donald L. Nelson, of the Quartermaster Market Center of the United States War Department, at Guadalupe, California, requested bids for 1490 crates of U. S. Number 1 Grade Celery, for export, to be packed in a specified manner for shipment to Seattle, Washington, and to be subject to inspection for condition at such destination.

IV.

That plaintiff, by oral quotation, submitted a bid to furnish such celery at the price of \$2.30 per

erate, and the Quartermaster Market Center of the United States War Department accepted such bid.

V.

That the Quartermaster Market Center of the United States War Department, at Los Angeles, thereafter, and in the course of normal procedure, issued three War Department Purchase Orders, Form WD 18, signed by the contracting officer and designated as LOS A 8259, 8260, 8261, embodying the terms of said request, bid and acceptance, and that said purchase orders were transmitted to the plaintiff in the course of normal procedure by mail.

VI.

That Purchase Order Forms WD 18, and the terms thereof, were authorized for use by the Quartermaster Market Center in purchases such as this by 813.1317b of 10 C.F.R. 1944 Supp., as published in the Federal Register, and [43] as revised, and then codified in 10 C.F.R. 1945 Supp., 813.1317b, at page 1530.

VII.

That said purchase orders satisfied the requirement of paragraph 303 of Procurement Regulation No. 3 (10 C.F.R. 1944 Supp. §803.303) that such purchase transaction be evidenced by a written contract.

VIII.

That said written contracts embody the entire agreement of the parties hereto.

IX.

That the terms of said contracts provided for "Inspection and Acceptance at Destination."

X.

That the "destination" under the terms of said contracts was Seattle, Washington.

XI.

That "U. S. Standards For Celery" (effective August 15, 1946) was published by the United States Department of Agriculture, printed in the Federal Register, and provided the standards by which inspections were made by Federal-State Inspectors.

XII.

That said celery was shipped and arrived in Seattle, Washington, where it was inspected for condition by a Federal-State Inspector and found to be decayed beyond the tolerances permitted by "U. S. Standards for Celery." and not fit for export.

XIII.

That based upon the condition of said celery on inspection at destination, to wit, Seattle, Washington, the defendant rejected and refused to accept said celery and refused payment therefor. [44]

Conclusions of Law

The Court makes the following conclusions of law:

I.

That this is a suit of a civil nature brought against the United States of America and jurisdiction of

this Court is invoked under the provisions of Title 28, Section 1346 (a)(2) U.S.C., and that this Court has jurisdiction to hear and determine the within matter.

II.

That the purchase orders were the contracts and embodied the entire agreement between the plaintiff and the defendant.

III.

That the plaintiff failed in the due performance of said contracts.

IV.

That plaintiff may not recover the purchase price therein.

Wherefore, the Court finds for and in favor of the defendant herein and against the plaintiff, and that the defendant have judgment against the plaintiff for costs of suit incurred herein. Judgment is hereby ordered to be entered accordingly.

Dated: April 2, 1951.

/s/ JAMES M. CARTER,

United States District Judge.

Approved as to Form:

ALFRED D. HAINES, and
SCHAUER, RYON &
McMAHON,

By,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 3, 1951. [45]

In the United States District Court in and for the
Southern District of California, Central Division

No. 11423-C Civil

CALIFORNIA VEGETABLE GROWERS, a
Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on March 6, 1951, before the Honorable James M. Carter, Judge, presiding; the plaintiff appeared by Alfred D. Haines, Schauer, Ryon & McMahon, by Alfred D. Haines and Robert W. McIntyre, its attorneys, and the defendant appeared by Ernest A. Tolin, United States Attorney, Clyde C. Downing, Robert K. Grean, Assistant U. S. Attorneys, by Robert K. Grean, Assistant U. S. Attorney, its attorneys; and said cause was tried before the Court sitting without a jury; and evidence both oral and documentary having been admitted, and the cause having been argued by counsel and submitted to the Court for decision, and the Court, after due deliberation, having filed its Findings of Fact and Conclusions of Law in writing, and ordered that Judgment be entered herein in accordance herewith in favor of the defendant and against the plaintiff;

Now, Therefore, by reason of the law and findings,

as aforesaid, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff, California Vegetable Growers, a corporation, take nothing by this action, and that the [47] defendant, United States of America, do have and recover of and from the plaintiff the sum of \$20.00, its costs incurred in this action.

Dated: April 2, 1951.

/s/ JAMES M. CARTER,
United States District Judge.

Approved as to Form:

ALFRED D. HAINES, and
SCHAUER, RYON &
McMAHON,

By,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

Judgment entered April 3, 1951.

[Endorsed]: Filed April 3, 1951. [48]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named plaintiff, California Vegetable Growers, a corporation, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, made and entered in this action on the 3rd day of April, 1951, and entered in Judgment Book No. 71 at page 686 thereof. This appeal is being taken from the whole of said Judgment.

Dated: April 24, 1951.

SCHAUER, RYON &
McMAHON,

ALFRED D. HAINES,

ROBERT W. McINTYRE,

By /s/ ROBERT W. McINTYRE.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 26, 1951. [50]

In the United States District Court, Southern
District of California, Central Division

No. 11423-C Civil

Honorable James M. Carter, Judge, Presiding.

CALIFORNIA VEGETABLE GROWERS, a
Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Tuesday, March 6, 1951

Appearances:

For the Plaintiff:

SCHAUER, RYON & McMAHON, by
ALFRED D. HAINES, ESQ., and
ROBERT McINTYRE, ESQ.

For the Defendant:

ERNEST A. TOLIN,
United States Attorney, by
ROBERT K. GREAN,
Assistant United States Attorney.

(Other court matters.)

The Court: The Shingle case will start tomorrow morning at 10:00 o'clock, and we will take up the Vegetable Growers case now.

Mr. Grean: May it please the court, in this matter the stipulation on file calls for the purchase orders in this matter to be attached thereto. That was inadvertently overlooked. At this time I would request the court to attach them to the stipulation.

The Court: Do you have a copy for my file, too?

Mr. Grean: Yes.

The Court: The clerk will attach them to the stipulation of facts filed January 30, 1951.

I couldn't find them on my copy and I figured they were on the court's original.

Are these cited in your stipulation?

Mr. Haines: Yes, they are.

Mr. Grean: Yes.

The Court: I see in paragraph III it says: "On December 13, 1946, plaintiff submitted a bid to furnish such celery * * *"

Is that bid one of the documents?

Mr. Grean: Not as to the stipulation.

I do have copies of the bid and offering that may be [2*] entered on stipulation of counsel. That is, abstracts of the bid.

The Court: Where do you identify these documents? Down in paragraph IV you say a certificate of inspection is attached.

Mr. Grean: No, sir. Top of page 5 of the stipulation.

The Court: Those are the three you handed me now?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Grean: Yes.

The Court: In your stipulation you say in paragraph IV:

“A copy of Inspection Certificate 65049 covering such inspection is attached hereto as a part of this stipulation.”

Mr. Grean: That's right.

The Court: It is not a part of my copy.

Mr. Grean: It is a part——

The Court: Let me have the clerk's file.

These files that you give to the court aren't much good unless you have it complete.

Mr. Grean: I have additional copies if the court will bear with me to produce them.

The Court: The clerk has an idea. Let's take them out of the stipulation of facts.

Mr. Haines: Counsel referred to abstracts of the written bid and acceptance. We haven't copies of those. I think possibly they should be—— [3]

Mr. Grean: Would you like at this time to stipulate that those may be a part of the stipulation?

Mr. Haines: Let me inspect them first.

The Court: What is this?

Mr. Grean: Abstracts of the offering and bids received.

These will be presented.

On stipulation of counsel they may be made a part of the stipulation. They are not referred to therein, however they are identified as abstracts of offering and bids received.

The Clerk: You have given me three here.

Mr. Grean: That's right. Each one is for a different car lot.

The Clerk: This is one set of three different documents, is that correct?

Mr. Grean: That is correct.

The Court: Do you have another set for me of the inspection certificates that you say are attached?

Mr. Grean: Yes.

Mr. Haines: The only objection we have to this is that we can't read it. The copies are so poor that they are not legible.

The Court: Where is the original?

Mr. Grean: I have a copy of it under seal, if the court please. It might be a better copy. [4]

Mr. McIntyre: We might be able to go over this and identify some of the things that are on it.

Mr. Grean: Here are copies for the court of the inspection certificates, destination inspection, and reinspection.

The Court: What are these short documents?

Mr. Grean: Notice of arrival.

The Court: So we won't break up your stipulation that you have prepared with the copies attached, I am going to take these copies that you have indicated with "For the Court," and mark them as exhibits in this case.

I take it there is no objection to calling them Plaintiff's Exhibits?

Mr. McIntyre: There is no objection to calling them that. Either party's.

The Court: Inspection certificate No. 65049 will be Plaintiff's Exhibit 1. I am following the order

in which you have them in your stipulation. Inspection certificate No. 65048 will be Plaintiff's Exhibit 2 in evidence. Inspection certificate No. 65025 will be Plaintiff's Exhibit 3.

PLAINTIFF'S EXHIBITS Nos. 1, 2 and 3

[Plaintiff's Exhibits Nos. 1, 2, and 3 are identical to Certificates attached to the Stipulation of Facts. See pages 20 to 22 of this printed record.]

Admitted March 6, 1951.

Form No. 53-1-PFE, Request for Confirmation, that form without a file number and having only in the right hand corner "Guadalupe, California," will be Plaintiff's Exhibit 4.

Mr. Grean: It does have a car number, your Honor.

The Court: Referring to car number RD-3086. Is that right?

Mr. Grean: Yes. [5]

The Clerk: Yes.

The Court: A similar Request for Confirmation having file No. G-5039, Guadalupe, 12-26-46, referring to apparently car PFE 41017, will be Plaintiff's Exhibit 5.

And the Request for Confirmation, file G-5023, Guadalupe, 12-26-46, referring to car PFE 45854 will be Plaintiff's Exhibit 6.

Inspection certificate D-43196—

Mr. Grean: That is a defendant's exhibit.

The Court: That is a defendant's exhibit?

Mr. Grean: Yes. The defendant will use it as one of its exhibits.

The Court: That will be Defendant's Exhibit A.

No. B-46844—that is the plaintiff's exhibit?

Mr. Grean: This is also a defendant's exhibit. Those are all inspection certificates upon which the defendant relies for rejection.

The Court: That will be Defendant's B.

Inspection certificate No. D-43195 will be Defendant's C, and Inspection certificate B-46845 will be Defendant's E—is that right, Mr. Clerk?

The Clerk: D, your Honor.

DEFENDANT'S EXHIBIT D

[Defendant's Exhibit D is identical to Certificate B-46845 attached to the Stipulation of Facts. See page 28 of this printed record.]

Admitted March 6, 1951.

Mr. Grean: That may be considered by plaintiff as their exhibit. However, it makes no difference to the case.

The Court: All right. [6]

Inspection certificate No. D-43243 will be Defendant's Exhibit E, and inspection certificate No. B-46839 will be Defendant's Exhibit F. And the three typed War Department purchase orders, is there any preference in the order of them?

DEFENDANT'S EXHIBITS E AND F

[Defendant's Exhibits E and F are identical to Certificate Nos. D-43243 and B-46839 attached to the Stipulation of Facts. See pages 29 and 30 of this printed record.]

Mr. Grean: No preference, your Honor.

The Court: Order No. LOS A 8259 will be Defendant's Exhibit—is this a defendant's exhibit?

Mr. Grean: A plaintiff's exhibit. A defendant's exhibit, I beg your pardon.

The Court: Defendant's Exhibit G. And order No. LOS A 8260 will be Defendant's Exhibit H. Order No. LOS A 8261 will be Defendant's Exhibit I.

DEFENDANT'S EXHIBITS G, H AND I

[Defendant's Exhibits G, H and I are identical to Orders attached to the Stipulation of Facts. See pages 31 to 36 of this printed record.)

Admitted March 6, 1951.

Mr. McIntyre: Those last are the memorandums of the abstracts of the bid, I take it? You have LAPO No. 8260 on these.

The Court: That identifies all the exhibits which are referred to in the stipulation.

In addition thereto counsel have stipulated concerning some summary sheets, concerning bids offered, to which some comment has been directed

that they are illegible. Do we have the originals of them?

Mr. Grean: I do not have the originals, your Honor. I do have some under seal that might be——

The Court: Let me see what you have under seal to see if [7] they are more readable.

Mr. Haines: Do I understand, counsel, that these are abstracts of the oral bid and acceptance written up in the office of the quartermaster?

Mr. Grean: Yes.

Mr. Haines: They are not actually a written offer or a written acceptance?

Mr. Grean: That is correct.

Mr. Haines: They are simply an abstract from the records of the quartersmaster's department?

Mr. Grean: That is correct.

The Court: The record will show that the exhibits heretofore identified are all in evidence by stipulation?

Mr. Haines: That is correct.

The Court: For the purpose of the motion and the trial both.

(The documents referred to were marked Plaintiff's Exhibits 1, 2, 3, 4, 5, and 6, respectively, and Defendant's Exhibits A, B, C, D, E, F, G, H, and I, respectively, and were received in evidence.)

The Court: These are a lot more legible. What kind of document is this—War Department? What kind of seal is it? They are records of the Army.

Is there any of the small type involved here that you are interested in?

As I understand this procedure of making an abstract of [8] bids offered, the quartermaster's office, when bids have been asked for, at the appointed time opens the bids and he has a form there in which he writes down a sort of summary of what bids were offered, and in this particular case apparently on lot or order No. 8261 there were two bids, on order No. 8259 there was only one bid, and on order No. 8260 there were two bids. Other people didn't bid. So I don't see that there is very much probative value in these things.

Mr. Haines: There are one or two matters there which might be very important in reference to the terms of the agreement, and the copies that counsel furnished us were in such shape that I couldn't make out what it was. I refer specifically to the Abstract of Offering.

The Court: Which order number?

Mr. Haines: This one here seems to be fairly legible. It is 3772, LA Lot No. 3772, Lot No. 1194, Car No. PFE 45854. I assume that these are identical in connection with all three carloads?

Mr. Grean: Yes. With the exception of the purchase order numbers to which they refer, and perhaps the number of bids received.

Mr. Haines: As to reference to date, to the delivery, and with reference to inspection points they are identical?

Mr. Grean: They are all identical, yes. [9]

Mr. Haines: With that understanding this one

copy that we have with reference to one car would suffice.

The Court: Which one are you talking about now?

Mr. Haines: I am referring to the Abstract of Offering with reference to car 45854. The LA lot number is 3772. It is Purchase Order 8261.

The Court: Yes. Well, that is fairly legible.

Mr. Haines: Yes.

The Court: A document of two pages, photostats of an original, page 1 entitled Abstract of Offering, and page 2, Bids Received, referring to LA lot number 3772, car number PFE 45854, and also referring to a number 8261, in connection with LA lot number 3772, will be marked in evidence as—whose exhibit?

Mr. Grean: Defendant's Exhibit, your Honor.

The Court: Defendant's Exhibit J, and by stipulation received in evidence.

(The document referred to was marked Defendant's Exhibit J, and was received in evidence.)

The Court: Are the check marks identical?

Mr. Grean: They are identical on all three copies.

The Court: I will also receive in evidence as Defendant's K the Abstract of Offering and Bids Received with reference to car SFRD, it looks like 3086, LA Lot No. 3770, also referring to LAPO No. 8259. [10]

(The document referred to was marked Defendant's Exhibit K, and was received in evidence.)

Mr. Grean: If the court please, the easiest way to identify the document is by the PO number, because they are then tied in with the purchase order number, 8259, that is legible on all copies, 8261 and 8260.

The Court: And LAPO 8260, LA Lot No. 3771, which involves car No. PFE 41017, as Defendant's L. With the understanding that if there is any of this material, parts of these exhibits J, K and L that we can't read, the burden will be on the defendant to take out of this Army file or have photostated out of the Army file a more legible copy and insert it. However, I think we can understand those things we have to understand from the copies we have.

Do you want to proceed?

Mr. Grean: By introduction to this motion for summary judgment, if the court please, attention is called to the plaintiff's complaint on file herein, wherein it is alleged an oral agreement on or about the 13th day of December, the amount to be paid, that the oral agreement took place at Guadalupe, California, that in accordance with said oral agreement celery was packed and shipped by plaintiff to Seattle after it was first inspected, it was wrapped and packed in a manner unacceptable in commercial channels, but in compliance with the request or agreement, that there were [11] commercial bills of lading which were to be converted at destination to

government bills of lading, that the celery arrived at Seattle, but that the defendant did refuse to pay the agreed purchase price upon the grounds that said celery did not pass inspection at destination.

It is further alleged, by reason of the non-commercial wrap and pack, the amount that plaintiff was only able to recover, and that prior to the filing of this complaint they had exhausted all their remedies.

If the court will please note, there is no allegation to the effect anywhere in the complaint that the said celery was wrongfully refused, that there was no right of inspection, or that the plaintiff had in any way complied with all of the terms and conditions of its contract.

Now, I am just calling that to the court's attention in passing because it bears slightly on the basis of the summary judgment which is taken at this time rather than a motion for judgment on the pleadings.

In view of the stipulation of facts and the complaint and the exhibits attached thereto, plaintiff attempts to allege an oral contract with an agent of the government who has no authority to contract, to terms contrary to those which an authorized contracting officer could make, all for the purpose of avoiding their agreed duty to permit inspection at destination. [12]

As to the first count, a contract of the type upon which plaintiff bases its suit could only bind the government if in writing in accordance with the laws and regulations thereunder.

The applicable statute is that which appears, if the court please, in Title 5, U.S.C.A., Paragraph 219.

That provides that contracts in excess of \$500 not to be performed within 60 days shall be reduced to writing and signed by the contracting parties, and in all other cases contracts shall be entered into under such regulations as may be prescribed by the Secretary of War.

What did the Secretary of War prescribe in this case?

Since the contract in suit, whether an oral understanding or the agreement alleged by the written purchase orders, is not specifically covered by this statute, it becomes necessary to look to the regulation, and that particular regulation is paragraph 303 of Procurement Regulation No. 3, which may be found in 10 Code of Federal Regulations, 1944 Supp., Paragraph 803.03. It was issued by the Secretary of War and was in effect at the time. And this provided under the heading "General Requirements for Contracts":

"Every purchase transaction except those where payment is made coincidentally with receipt of supplies will be evidenced by a written contract." [13]

The purchase order form unilaterally signed by the contracting officer was authorized by subparagraph 303.4 under the heading "Purchase Orders" when used, and it states that if the contractor's assent is not evidenced either by a written quota-

tion or by acceptance of the purchase order in writing, the purchase order may nevertheless be used for any purchase transaction the contract price of which is less than \$100,000 provided that the purchase order is preceded by an oral quotation.

The Court: Now, let me get that again.

That is what you have set forth in paragraph III of your memorandum, isn't it?

Mr. Grean: Yes. Shall I proceed?

The Court: Yes; but you have only quoted part of it and you have read more of it. Will you read again what you read from that regulation?

Mr. Grean: If the "contractor's assent is not evidenced" and this is a quotation from the section which pertains to this particular method used in this matter—"either by a written quotation or by acceptance of the purchase order in writing"—

The Court: Stop right there. Isn't the assent here evidenced by a written quotation?

Mr. Grean: No, it is not.

The Court: Didn't they make a written bid? [14]

Mr. Grean: No, it is not. It was an oral bid.

The Court: It was an oral bid, which was entered on this summary of bids?

Mr. Grean: That is correct. All the bids thereon were oral.

The Court: All right.

Mr. Grean: In fact, if you refer to the face page of the purchase order—

The Court: The purchase order was in writing, but there was no written acceptance of the purchase order?

Mr. Grean: That is correct. And there is none required by law. In other words, this method of operation is one that was set up during the war by regulations of the Secretary of War, printed in the Federal Register.

The Court: Pardon me for interrupting. Now, read that paragraph where it says the "contractor's assent"——

Mr. Grean: "The purchase order may nevertheless be used for any purchase transaction the contract price of which is less than \$100,000, provided that the purchase order is preceded by an oral quotation." And there is more to the paragraph which I feel is not pertinent to this situation.

The Court: "is preceded by an oral quotation"?

Mr. Grean: That is correct.

The Court: Is that what happened in this case, the oral quotation was made first and then the purchase order was [15] issued?

Mr. Grean: That is correct, and that is quite common procedure. In fact, the face page of your purchase order states: "Pursuant to an oral quotation."

In other words, if the court please, we have the law requiring that the contract be in writing; second, the law authorizing the method by which such a purchase may be made. In fact, going so far as to set out the actual War Department form No. 18 in the Federal Register with instructions for its use.

The Court: I don't follow you on that.

Does the purchase order set out this matter you refer to as form 18?

Mr. Grean: It does, your Honor.

The Court: See, I didn't see these until this morning, I haven't seen these purchase orders. Which is the form 18 that you talk about?

Mr. Grean: At the bottom left-hand corner of the purchase order, printed thereon.

The Court: I see. War Department form 18. And that has something on the reverse of it?

Mr. Grean: Yes.

The Court: Revised, according to your memorandum, November 11, 1944, and was set out in toto in the Federal Register and then codified in 10 Code of Federal Regulations. [16]

"The general provisions required to be contained on the reverse side" of the form.

You say "required to be contained"; does the regulation require——

Mr. Grean: The regulation sets out the language exactly that is to be used on the reverse side of the form.

The Court: Including this one on inspection, paragraph 2?

Mr. Grean: Yes.

The Court: Now, where does "inspection" appear on the back in all the small print? No. 4?

Mr. Grean: No. 4.

The Court: I am either going blind or—I can't read that.

Here is one I can read. Here is one a little more legible.

All right.

Mr. Grean: The court's attention is also called to the inspection provision on the second continuation sheet, Special Conditions paragraph 1.

The Court: Is this something extra or is that something required by regulation or statute?

Mr. Grean: That is something extra which has been added over a long period of time by departmental regulation. And, of course, the departmental regulations properly adapted to [17] enforcement of the statute have the force of law, according to *United States v. Christensen*, a case in 1943. It is settled by many recent decisions of this court that a regulation by a department of the government addressed to and reasonably adapted to the enforcement of an Act of Congress, the administration of which is confined to such department, has the force and effect of law if it not be in conflict with the express statutory provision.

The Court: Let me see first what it contained in this continuation sheet, or can you tell me in a few words, under Inspection?

Mr. Grean: Yes, if the court please. The continuation sheet provides for inspection for quality, counts, at point of origin.

The Court: Point of origin?

Mr. Grean: Right. It provides, further, for inspection for condition and quantity at point of destination, and provides for all conditions inspection privileges at destination where such inspection has not taken place at the point of origin, which is not the contention in this case.

The Court: Form 18, Exhibits G, H and I, has "Methods of presenting invoices or vouchers," and so forth, "on commercial bill of lading to be converted to government bill of lading at destination."

Is there a dispute as to what that means? [18]

Mr. Grean: Apparently additional significance is being attached to that particular method by the plaintiff in their various memoranda in the matter.

The Court: I can understand why the government would want a government bill of lading on these land grant railroads, because they got a cheaper rate, but it says "commercial bill of lading to be converted to government bill of lading at destination." Does that mean at destination, which was Seattle, it was first to be picked up on a government bill of lading? Up to that time it was on a commercial bill of lading?

Mr. Grean: No. That means that the commercial bill itself is converted to a government bill for the sake of expediency at Seattle.

The Court: Converted back over the period of transit from Guadalupe to Seattle?

Mr. Grean: Yes.

The Court: Is that what is meant, do you both agree to that?

Mr. Haines: No, your Honor. My understanding of it is that in order for the government to take advantage of the land grant rates title had to pass to the government at point of shipment. That is why they used the commercial bill of lading from Lompoc, which was the shipping point, to Seattle, but with the provision that it be converted to government [19] bill of lading at that point.

The Court: By conversion you mean going back and taking the commercial bill of lading that covered the goods from Guadalupe to Seattle and convert it to government bill of lading covering that same period of transit?

Mr. Haines: That's right.

The Court: We are in agreement, then, as to what that means.

Mr. Grean: However, if the court will accept Defendant's statement, which we think will be proved, the fact that the necessity of title passing at point of—F.O.B. in the usual commercial connotation is not indicated by this transaction by use of a commercial bill of lading.

The Court: I am noticing, also, here "Schedule of deliveries, 23 December, 1946," again referring to what exhibit, Mr. Clerk?

The Clerk: They are G, H, and I, your Honor.

The Court: "Schedule of deliveries," referring to Exhibit H, "23 December, 1946, Inspection Points—Inspection and acceptance at Destination."

Mr. Grean: That is correct.

The Court: Is there any dispute about what that means?

Mr. Haines: Yes, considerable.

The Court: All right. Go ahead, Mr. Grean.

Mr. Grean: In view of the allegation of plaintiff's [20] complaint, faulty, though it may be, "That said sale and delivery"—paragraph V on page 2—"of said celery was made in accordance with an oral understanding and agreement arrived at by and between plaintiff and defendant at Guada-

lupe, California," it is pointed out that the civilian field representative has no authority to contract.

His status is quite well defined in Supply Bulletin issued by the Secretary of War, No. 10-117, subparagraph 9(c).

Would the court like to follow that in the bulletin itself?

The Court: Yes, if you have an extra copy I will look at it.

Describe what you are reading from so counsel will know.

Mr. Grean: I believe I have described the following paragraph in Supply Bulletin No. 10-117, subparagraph 9.

The Court: Status of market centers, is that right?

Mr. Grean: Refer to 9(c), if the court please.

The Court: 9 says, "Status of market centers," and then it has (a), (b), (c), and you want to read from what—(c)?

Mr. Grean: Yes.

"Co-ordination of duties between purchasing and contracting officers and marketing specialists. In order for market center offices to operate efficiently, there must be close [21] co-operation between the purchasing and contracting officers and marketing specialists. The marketing specialist should have more knowledge relative to the actual selection, inspection, and buying of perishable commodities, hence will do most of the work of this nature. How-

ever, this does not relieve the purchasing and contracting officer of being prepared to assume these functions at any time. Likewise, the marketing specialist should be in a position to assume all duties that normally are performed by the purchasing and contracting officer, except signing procurement instruments."

The Court: Do you think that adds very much?

Mr. Grean: I believe that it lends further weight to the fact that the civilian field representative to whom they refer had no authority to contract.

The Court: What was he, a marketing specialist?

Mr. Grean: A marketing specialist.

The Court: That doesn't appear by any stipulation, any affidavit, any document in this record, does it?

Mr. Grean: He is referred to in the complaint as "defendant at Guadalupe, California."

The Court: With that we wouldn't know who was at [22] Guadalupe, California. It might have been a General, Private, or Marketing Specialist, as far as the allegations of the complaint are concerned.

Mr. Grean: That will be proven at the trial.

The Court: I am addressing my remark now to the fact that we are arguing a motion for summary judgment.

Mr. Grean: I see your point.

The Court: Whether that is material on a motion for summary judgment, or not, I don't know,

but certainly there is nothing before me to show who this man was at Guadalupe. The complaint merely alleges they orally contracted with the defendant at Guadalupe.

Mr. Grean: Well, let's look to the stipulation of facts.

The Court: "Quartermaster Market Center," is all it says, accepted the bid. Paragraph III.

Mr. Grean: For the sake of brevity, will the court accept an affidavit, and will counsel stipulate to an affidavit indicating that the field representative referred to, one Donald Nelson, was the government's representative at Guadalupe?

Mr. Haines: Yes, we will so stipulated, your Honor.

The Court: You stipulate that the government's representative at Guadalupe was Donald Nelson?

Mr. Haines: That's right. [23]

The Court: And that he is the man that you orally contracted with?

Mr. Haines: Yes.

We can't stipulate to what his exact functions are, because that is not within our knowledge, whether he was a field representative or a specialist, or one of a thousand titles that in these thousands of regulations he might be called, we have no way of telling. It is knowledge particularly within the defendant.

The Court: Pardon me just a minute. I will give the reporter a rest, so we will take a recess at this time.

(A recess was taken.)

Mr. Grean: In furtherance of the contention as to the marketing specialist, by stipulation of counsel, this affidavit is presented.

Mr. Haines: For the sake of clarity, counsel, I understand that your contention is that Mr. Nelson was a marketing specialist, and I am stipulating to that. Further, that as a marketing specialist he had full power to negotiate the contract, but he couldn't sign the actual written evidence of the contract.

Mr. Grean: Couldn't execute the contract.

Mr. Haines: He could do everything up to the signing of the contract?

Mr. Grean: Exactly. [24]

Mr. Haines: That was his purpose and function?

Mr. Grean: Yes.

The Court: That is so stipulated, is it?

Mr. Grean: And that Donald Nelson was the marketing specialist with whom you made the alleged oral agreement?

Mr. Haines: That's right.

The Court: That is so stipulated, is it?

Mr. Haines: It is.

Mr. Grean: It is.

The Court: This affidavit of Wyman H. Montavan will be made Defendant's Exhibit M, received by stipulation, is that correct?

Mr. Haines: Yes, your Honor.

(The document referred to was marked Defendant's Exhibit M, and was received in evidence.)

The Court: In case the record doesn't show it, all these exhibits that we have identified heretofore are in evidence by stipulation.

All right. Proceed.

Mr. Grean: To summarize, then, so far, we have shown that the law requires a contract to be in writing; second, that the unilateral purchase order form used in this matter in this case was the one prescribed by law; third, that the conditions contained thereon in the printed portions were those published in the Federal Register as a requirement to [25] the back of said War Department Purchase Order No. 18; fourth, that the Marketing Specialist could negotiate a contract but could not execute one.

Now, let's look to the legal limitations imposed upon the contracting officer, with regard to the terms and conditions to which he could bind the government in a transaction such as this.

You see, plaintiff has attempted by alleging an oral contract throughout this situation to avoid an inspection at destination, provisions of the written purchase orders, which would result in barring their recovery.

The purchase in issue was made pursuant to the authority granted to the Quartermaster Market Center System by the Secretary of War through the Supply Bulletin which you have up there, if the court please, No. 10-117, the little black booklet.

The Court: Yes.

Mr. Grean: Subparagraph 8(a) of said Supply Bulletin provides for purchasing items of perishable subsistence F.O.B. origin or destination as will best

serve the interests of the government. However, section 20a provides:

“Inspection may be accomplished at point of shipment or at destination, whichever is more feasible. Inspection at origin is encouraged in order to decrease the number of rejections [26] at destination. However, final acceptance and possession by the government is contingent upon inspection for quantity, soundness, and condition at destination.”

You will note that inspection at origin is encouraged in order to decrease the number of rejections at destination, presuming if merchandise or produce at origin passed inspection, the chances are that the condition would be proper at the destination.

Subparagraph 20b(4):

“Carlot inspection. Market centers will also encourage contractors supplying carlot shipments of fresh fruits and vegetables”——

Quoting in part:

“to furnish a Federal certificate as evidence that the commodity meets the grade requirements under which purchased. * * * Final inspection for condition and count will be made at destination.”

The Quartermaster Market Center is therefore operated by authority and under the limitations of the above-quoted sections—I believe that particular bulletin is signed by George C. Marshall, as an instruction and a limitation—hence it is obvious that

any contract which the contracting officer had authority to make required the inclusion of the [27] inspection at destination conditions.

Those were the limitations on his operations.

It is well settled that the government could be bound only by the acts of its authorized agents. There is a lot of law on that. I don't know whether the court feels it is necessary that I take the court's time, however, I will point out one case, *Whiteside v. U. S.*, 93 U. S. 247, in which the court states at page 256:

“Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the *court* of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, * * *”

The Court: I am familiar with that rule.

I think one of the outstanding examples of that rule is the West Point case on condemnation, where the government was condemning the water supply of the town of West Point, and [28] some Army officer assured the town that if the condemnation went through they wouldn't have to worry about

their water supply, they would have plenty of water, as long as they wanted it. It turned out that, I think, Congress had to subsequently enact a law to give West Point back its water supply.

The government was not bound by the statement made by their officer.

Mr. Grean: Let's carry it a step further. Let's assume that the contracting officer could ratify, he could ratify a contract made by his assistant, the Marketing Specialist. It must nevertheless be understood that their power in that behalf was restricted to the ratification of such contracts as they themselves—this is in the Whiteside case—were empowered to make. [29]

In other words, if the contract in itself did not make a contract, they abrogated the provisions of that supply bulletin with regard to the procurement of perishable vegetables.

The Court: I have your point.

Mr. Grean: Apparently it will be clear that, even assuming now that this had been reduced to writing with the inspection at destination provision omitted, the transaction would be subject to that provision anyway, or there would not have been any contract in this purchase at all.

The cases are manifestly manifold in support of the statement that such an agreement, where required by statute, must be evidenced by writing. I have quoted such cases in my memorandum, and I don't feel it necessary to go through the statements of those cases at this time.

Just one point as to the present invoice being

governed by federal law. I notice by the trial memorandum as submitted by plaintiff that he places various California code sections into the record, and also cites various cases which are based on California law. The manner of purchase in such a case is governed by the specific federal statute. Judge Yankwich in *United States v. Jones* recently ruled on that. It is a 1949 case, and he quotes from *U. S. v. Allegheny County*, wherein he states:

“Every acquisition, holding, or disposition of [30] property by the federal Government depends upon proper exercise of a constitutional grant of power. * * * The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.”

The Court: Let me have that citation again.

Mr. Grean: That is *U. S. v. Jones*, 176 Fed. 2d, 278 (1949).

The Court: Was Judge Yankwich sitting on the Circuit at that time?

Mr. Grean: Yes. That is at page 281, and he quotes from *U. S. v. Allegheny County*, which is a leading case on the point, 322 U. S. 174, a 1944 case.

The Court: These district judges do get around.

Mr. Grean: In the *Allegheny* case, at page 182, the court states:

“The Constitution provides that ‘The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.’ * * * [31] It also gives Congress the power ‘to make all Laws which shall be necessary and proper for carrying into Execution’ all powers vested in the Government or in any department or officer thereof * * *, and it makes the laws of the United States enacted pursuant thereto ‘the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ ”

The Court: Go ahead.

Mr. Grean: In the light of the foregoing, then, it would appear that if the plaintiff relies upon an oral agreement, which the law states must be in writing, such contract must fail. If, however, he submits to the only contract in the case, which is set out in the purchase order which was made within the limits of the authority and in the manner and form required by law, then he must be bound by the inspection provisions therein required and having been bound thereby, the inspection certificates in this case bear out the fact that inspection on condition revealed just cause for rejecting this as not being fit for export.

The word “export” is not new in this matter. It appears throughout the stipulations, and it appears throughout the [32] various pleadings in this matter.

Now, this was not a commercial wrapping, but especially wrapped for export. There was an implied warranty that it would meet that situation.

The Court: May I have the exhibits, Mr. Clerk?

The Clerk: Yes.

Mr. Grean: Now, mind you, the distinction which must be made is one as between quality and condition. Inspection for quality at point of origin, requiring a specific grade. Inspection for condition at destination. This celery was purchased for export.

The Court: Where does that appear? In what? Do you contend that "H" shows that? For instance, "H" is a contract. Where does it appear "for export"?

Mr. Grean: In the purchase order?

The Court: Yes.

Mr. Grean: On the face thereof:

"Each stalk to be individually wrapped in parchment paper; wrapper to cover complete shank of stalk. Crate to be wired, strapped at each end for Export."

The Court: For export.

Mr. Grean: "Marked: LADD-QMI-A56," which is the code to the quartermaster, and which is the destination it would ultimately have reached. [33]

LADD-QMI-A56.

The Court: The one I am looking at has "NOME." But that wouldn't be Nome, would it? That is probably just some code. It is on "H."

Mr. Grean: Now, from an inspection at point of origin showing no decay to an inspection at Seattle,

Washington, wherein it shows in the first car blight ranges from 4 to 17% in many crates, averages 6%. Decay irregular most crates ranges from 5 to 20%, averaging approximately 7%.

The Court: What are you reading from?

Mr. Grean: The inspection certificate.

The Court: Which car?

The Witness: No. 43243, covering car LA-8261.

Mr. Haines: Exhibit E, your Honor.

Mr. Grean: Now, of course, on the standards employed, I call the court's attention to a paragraph in the Supply Manual. May I have the Supply Manual?

Mr. Haines: Is it the contention of counsel that the Supply Manual is binding upon all parties, or is it a regulation or merely a directive to the governmental officers in the performance of their functions? I do not think we can indulge in the idea, your Honor, that each and every regulation and Supply Manual and bulletin directive to the governmental agency in question is the law of the land. I think there must be some pinning down of it to show that it is not [34] merely an intermural situation, in which the War Department is directing its agents as to how they want their records kept, and how they want them to conduct their business.

The Court: Was this particular manual ever published in the Federal Register?

Mr. Grean: The particular manual was not. However, portions of it, and have been referred to at times, that is, the War Department 14. That is the contract and the inspection provision.

Now, let's assume, however, for the sake of this discussion that this was a limitation upon the authority of the contracting officer.

Mr. Haines: I don't know how you can assume that, counsel. It may be a mere directive.

Mr. Grean: If you would prefer to assume it is also binding on you——

Mr. Haines: No, I don't assume that, and I can't assume it.

The Court: What is your point? You are assuming for argument that it is binding only on the contracting officer. What is your point?

Mr. Grean: That is a limitation of his authority. In other words, confining his activity in entering into an agreement, that it must be within these limitations. These were portions that were published in the Federal Register. [35] Other portions were not. What I am calling the court's attention to now are specifications.

Another point which will appear, if counsel wishes to argue this point now—it will appear from the cases that the court may take judicial notice of the fact that California Vegetable Growers did not come into the picture for one transaction on celery. They are in the business of dealing in produce, just as the Quartermaster was in the business of purchasing produce. This isn't the only transaction that was ever entered into, and the court may take judicial notice of the fact, not from what appears in the case, but from the status of the company involved.

The Court: Take judicial notice of what?

Mr. Grean: Of the fact that they are in the

business and were in the business at that time of selling produce, and that they, as well as everyone else, were aware of the conditions under which the Quartermaster did buy and could buy.

Mr. Haines: That is assuming an awful lot.

Mr. Grean: You can expect that John Smith, who has a potato patch out in the country, would know nothing about this perishable substance.

Now, these happen to be United States inspections. You will note from the face of them that they are prima facie evidence, by statute made prima facie evidence in courts of [36] Washington and the United States, but which does not relieve the holder from compliance with regulatory laws, evidence of the inspection, and the terms therein.

The United States Department of Agriculture, United States Standards for Celery, effective August 15, 1946——

The Court: From what are you reading now?

Mr. Grean: United States Department of Agriculture, Production and Marketing Administration, U. S. Standards for Celery, effective August 15, 1946.

Mr. Haines: I don't see that this has anything to do with this motion, your Honor. It is not in evidence.

Mr. Grean: The United States Standard for Celery is——

The Court: Well, you say "Standard." What is this published in? In a bulletin or in an administrative order? What is this Standard for Celery that you are reading from?

Mr. Grean: These are the standards upon which the inspection was made; these very inspection slips which you have on your desk.

The Court: These inspection slips refer to these standards you are referring to?

Mr. Grean: United States Department of Agriculture and the Washington State Department of Agriculture. These are forms that are used by the United States Department of Agriculture, and in order to judge what the basis of the particular inspection certificate is, it is necessary to refer to [37] the United States Department of Agriculture standards.

The Court: In other words, you are going down now to where they come to the conclusion, for instance, on Exhibit F, "Grade: Now fails to grade U. S. No. 1 Green only account decay, but now contains approximately 70% U. S. No. 1 Green quality; 25% decay."

Mr. Grean: That is correct.

The Court: Now, since this is made by an official of the Department of Agriculture, you are now referring to the Standards of the Department of Agriculture to interpret this conclusion?

Mr. Grean: That is correct, your Honor.

The Court: How are these standards published by the Department of Agriculture? Do you have a bulletin or a document of some kind there?

Mr. Grean: Yes, I do.

The Court: What does it say? What is its title?

Mr. Grean: The title is, "United States Depart-

ment of Agriculture Production and Marketing Administration, U. S. Standards for Celery (Effective August 15, 1946)." It is signed "Issued August 8, 1946. Reissued August 9, 1948," which is immaterial to this.

The Court: Signed by the director?

Mr. Grean: Signed by E. A. Meyer, Assistant Administrator, Production and Marketing Administration. [38]

The Court: Is this printed in the Federal Register?

Mr. Grean: Yes, it is.

The Court: All right. I am tentatively of the opinion it is a document the court would take judicial notice of.

Mr. Grean: The court must take judicial notice because this is the basis upon which these very inspection slips were arrived at, and quoting from that under the Standards for Celery, where it states, "U. S. No. 1," it states that it "shall consist of stalks" and then it describes the various characteristics and the type. However, it states:

"In order to allow for variations, other than lengths, incident to proper grading and handling, not more than 10 per cent, by count, of the stalks in any lot may be below the requirements of this grade, but not more than two-fifths of this amount, or 4 per cent, shall be allowed for decay, provided that not more than one-half of this decay, or 2 per cent, may be in the branches or in an advanced stage in the roots."

Now, as to this celery, as to quality there is no quarrel. It is like the purchase, if the court please, of Botany flannel and it comes to us as Botany flannel, but in transit it is torn, and it is of a condition which is not fit for the purpose it was [39] intended.

That is the situation with the celery, which was of a certain quality and might be the quality purchased, but the condition was not fit for export. This celery had gone just about one-fourth of the distance it had to go.

The Court: It is apparent now what those mean in those markings. Apparently one carload was for Ft. Richardson, one for Ladd Field, and the other one was for Nome. That is where they had to go. Go ahead.

Mr. Grean: There are further impelling reasons against permitting parties to a contract to base their causes of action on negotiations preceding written agreements rather than on the written agreements themselves. That is the reason the courts have persistently held that a written contract merges all previous negotiations and is presumed in law to express the final understanding of the parties. Now, more than ever, this doctrine has legal import in connection with Government contracting. Negotiation authority, under the Armed Services Procurement Act, has been employed by the Market Center System on a scale never before known in peace-time procurement. With the extension of negotiated purchasing to include all procurement by the military establishment, during the

present emergency declared by the President, the Government will require the protection of the well-established principles enunciated by our courts over the years, particularly since so much in negotiated buying [40] is of an oral character, which, if the rules were otherwise, would lead to a plethora of suits and claims against the Government if all negotiations preliminary to definitive contracts could be relied upon.

With regard to that I wish to quote from one case, which is *Clark v. United States*. It is a case involving an oral agreement. The court states at page 541:

“It is contended on the part of the Government”——

The Court: You did not give me the citation.

Mr. Grean: 95 U. S. 539 (1877):

“It is contended on the part of the Government that this Act is mandatory and binding, both on the officers making contracts”—in this case it was with the Secretary of War, and the Act referred to requires that they be reduced to writing—“and on the parties contracting with them; whilst the claimant insists that it is merely directory to the officers of the Government, and cannot affect the valdities of contracts actually made, though not in writing * * *

The arguments by which this view has been enforced by that court are of great weight and, in our judgment, conclusive. The facility with which the [41] Government may be pillaged by the presentment of claims of the most extradi-

nary character, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the Government should be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves and prevent them from making reckless engagements for the Government; but the considerations referred to make it manifest that there is no claim of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part." [42]

The Court: You have very ably presented your motion, but I don't want to pass on it now without hearing from the other side. But what is the advantage from your standpoint of having this case decided on a motion for summary judgment rather than upon the facts?

Mr. Grean: The only advantage is this, if the court please: It would be conceivable that such a

summary judgment granted as of yesterday would render it unnecessary to require the attendance of witnesses. It would render it further advisable from the standpoint of narrowing the issues of the case, in the event the court decided that the only contract which could be used in this case would be the written contract and would require evidence on that.

The Court: Yes, I have in mind that portion of your motion, that is, for summary judgment, or for summary judgment as to certain issues and defining of the other issues in the case.

Mr. Haines: Counsel, might I inquire, in this "Abstract of Offering" what the initials NMC stand for,—the "Inspection Points Seattle Market Center or NMC"?

Mr. Grean: NMC means Navy Markets Center.

The Court: I will hear from the plaintiffs after lunch. How much time do you want before we get into the other parts of this case?

Mr. Haines: I would say 30 minutes, probably, your [43] Honor.

The Court: Very well. 1:30. Come back at 1:30. Is that satisfactory?

Mr. Haines: That will be fine.

(Whereupon at 12:00 o'clock noon a recess was taken until 1:30 o'clock p.m. of the same day.) [44]

Tuesday, March 6, 1951. 1:30 P.M.

Mr. Haines: Shall I proceed?

The Court: Yes. You are Mr. Haines, aren't you?

Mr. Haines: That is correct.

May it please the court: I believe that the defendant's position can be fairly summarized as follows: First, that the contract must be evidenced by a written instrument; second, that in this instance the purchase orders are unilaterally executed by the defendant; third, that because the orders contain the provision reading "Inspection and acceptance at destination," the defendant had the right to inspect the produce at Seattle, Washington, on the ground that it did not pass inspection for condition there; and, fourth, that because of the regulations cited by the defendant calling for an inspection at destination, the defendant would have had the right to inspect at Seattle even if the contract did not so provide. I believe that, in substance, is the contention of the government.

For the purposes of this motion, we will accept the first two propositions as being true, even though it rather affronts our sense of legal propriety that a contract can be created unilaterally, one party only signing that contract, and the instrument they claim to be the contract, even though that instrument is prepared entirely by one of the two [45] parties and is never presented to the other contracting party for its approval and is never executed by the other party.

However, for the purpose of this argument, we will accept that as being the law. In acceding to that position, however, we do not wish to be misunderstood on two points: first, that granted that a contract binding the government must be evidenced by a writing, we submit that said writing must accurately and correctly reflect the meeting of the minds of the parties. For instance, the defendant could not cut the agreed price in half and then say that is the contract and that is binding on contractor, and, otherwise, it is no contract at all.

Even though the government can create a contract by a unilateral instrument, I take it, it is fundamental that that instrument must accurately set forth the oral meeting of the minds with reference to the subject-matter of the agreement. Second, granting that the federal statutes and regulations must be complied with in creating the contract, nevertheless, when the contract is made, then and thereafter the construction of that contract and the rights and liabilities of the respective parties under the contract are subject to the general principles controlling the sale of personal property.

We do not have in this contry, your Honor, two separate sets of jurisprudence, one federal and one state. The [46] general principles of the law of sales and the law of contracts appertains to the government as well as it does to individuals, and where in our trial memorandum we have cited certain sections of the California Civil Code, we are nevertheless setting forth the controlling law, the principles of the law on the subject-matter of this

suit, in so far as the passage of title, the risk of loss, and the other pertinent factors are concerned.

After all, we have in this state the Uniform Sales Act, and the Uniform Sales Act has been held in various cases to be nothing more nor less than an announcement of the common law. So we say that the rule contended for by the government is subject to those limitations, and we accede to their contention with those reservations in mind.

I stated that once a contract is entered into, from that point on we must look to the general and accepted principles of the law of sales to interpret the contract and to construe the rights and liabilities of the parties.

There are a number of decisions in the United States Supreme Court on the subject. In *U. S. v. Utah Stage Co.*, 199 U. S. 414, the court held:

“* * * * * These same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the government and individuals.” [47]

And in *U. S. v. Standard Rice Co.*, 323 U. S. 106, the court held, generally, that the United States is a contracting party and is to be treated as other contractors under analogous situations, and its contracts are to be interpreted in accordance with the law of contracts.

Again, in *U. S. v. Purcell*, 249 U. S. 313, it was held that:

“the government should be animated by a

justice as anxious to consider the rights of the bidder as to insist upon its own."

However, for the purpose of this motion we are accepting the proposition that the contracts, as evidenced by the purchase orders, are valid. We now come to the real nub of the defendant's argument, as presented by the third and fourth propositions which I have related. Those two propositions must be treated akin, and they are as follows: first, do the purchase orders provide for inspection at destination; and, second, where was destination?

The orders carry the provision reading, "Acceptance and inspection at destination," and also include the provision, "Delivery F.O.B. origin." Thus, on their face there is an inconsistency and a conflict. As shown by the authorities in our trial memorandum, it is the universal rule that where goods are shipped F.O.B. origin or shipping point, title passes to the buyer at that point, and risk [48] of loss thereafter is on the purchaser.

There is a corollary to the above which provides that the buyer has a reasonable right of inspection before acceptance. Therefore, even though title passes, the buyer, if he has not inspected it at origin has the right to inspect thereafter.

There is an annotation on that subject, your Honor, in 27 A.L.R. at page 524, where numerous case are reviewed, at the conclusion of which the annotation remarks, citing authority: Of course, where the purchaser inspects at shipping point, then he has no right of inspection at destination.

and he must accept the goods at destination; and otherwise he is liable for damages for his refusal so to do.

The Court: Wouldn't that be in a case where there was no contract providing for an inspection at any particular place?

Mr. Haines: Those case usually come up, your Honor, where, say, A in New York wants a load of oranges from B in California, and he has no possibility of inspecting them. The courts say that the general rule of the passage of title applies; that if it is F.O.B. California, it prevails, but despite the fact that title does pass, the right of inspection at destination remains in the purchaser, because of the fact that he did not have the opportunity to inspect at origin. But, as I say, the opposite of that rule is that if [49] he does inspect at origin, then he waives his right of inspection at destination. Your Honor says that in the event the contract provided for destination inspection, that it might be contrary. Well, in reference to the case at bar, I think we will touch upon that later. But there are two things, I think, that should be borne in mind all through this discussion. First, that this purchase order was written up seven to nine days after the contract was completed, as far as the plaintiff was concerned.

The Court: Right at that stage, can we stipulate what is apparently a fact, that the purchase orders, Exhibits G, H, and I, were written up after the celery had been shipped?

Mr. Haines: That is correct.

Mr. Grean: That is correct, your Honor.

Mr. Haines: 7 to 9 days afterwards.

The Court: I don't know that the time is important, but that they were actually written up after the shipment.

Mr. Grean: I will stipulate to that, providing it is understood it was done in the usual course of procedure of the Quartermaster Corps in handling all such types of contracts.

Mr. Haines: I can't stipulate to that effect, because I have no knowledge.

The Court: You can put on proof to that effect when we get to that stage of the case. But it is a fact that they [50] were typed up after the celery had been shipped?

Mr. Grean: That is correct.

Mr. Haines: Also, they were typed up by the defendant alone, and were not even submitted to the plaintiff for approval, other than execution.

We claim that the rule that is discussed in this Annotation applies here, because the produce was inspected and accepted at origin, namely, Lompoc, by the defendant before the purchase orders were drawn up.

Furthermore, even if the buyer had a further right to inspect again at some further point, such inspection would, of necessity, be limited to determining condition and count as of the time the buyer took possession and title, and could not be used as a basis of rejection because of any defects which arose after the buyer was put in possession and

control of the goods, attributable to his handling of the goods.

Rivers Bros. Co., v. Putney, 119 Pac. 108; Mette & Kanne Distilling Co. v. Lowrey, 101 Pac. 966.

This rule, we submit, is particularly applicable here, where shown on the face of the orders that the entire handling of the goods and the inspection was dictated by the buyer, that is, wrapping, icing, and shipping of the produce F.O.B. origin, or, to put it another way from Lompoc. The complete control and possession of the produce, as well as the title to [51] it, was in the defendant. What happened to it from that time on, we do not know. We do not know whether at some place along the line the doors of the car were left open for an unseasonable length of time. We do not know whether it was properly iced en route. We do not know a number of other things which might have happened to cause its condition.

We were responsible for the quality and condition of the celery up to the point that it was put on the car at shipping point. From that point on it was the problem of the defendant. Therefore, the defendant had a right to inspect at any further point, and that inspection, so far as we are concerned, must be limited to checking upon what the condition of the goods was when shipped at Lompoc. not as to some condition that arose under its own management and possession and control, over which we had no authority, and which was purely and simply the problem of the defendant purchaser.

We submit that under the facts and circum-

stances of this case, as shown on the face of the orders and by the stipulation of facts, that destination in this instance was Lompoc, California, at which point plaintiff had completed performance of every condition on its part to be performed, where title passed to the defendant, and where from that point on defendant had complete possession and control.

Obviously, the word "destination" is not meant the [52] ultimate geological point at which this celery was to be consumed. The defendant itself does not apply such a meaning to the word. On the face of the orders it shows the celery was to be transshipped to a steamship, the "Palisana" in Seattle.

We further learned today by the production of these abstracts and acceptances that the ultimate destination was Alaska. So when the defendant itself uses the word "destination," it doesn't mean the ultimate point of consumption or arrival. It refers to Seattle as the destination, but if it does so, it cannot use the word "destination" literally, because Seattle was merely a point of transshipment.

We, therefore, claim that under the defendant's own interpretation of the word, the point of destination was the point at which possession, control, and title passed from the plaintiff to the defendant, and that point was admittedly Lompoc, California. If in the construction of the word "destination," any uncertainty arises because of the conflicting provisions in the orders, i.e., and I quote it, "Delivery

F.O.B. origin.” And the significance which is universally lent to that phrase, and the provision, and I quote again, “Inspection and acceptance at destination,” then that uncertainty and ambiguity must be held against the defendant as the sole author of the instruments. This is the universal rule of construction and applies with equal force to government contracts. *Sculley v. [53] U. S., 197 Fed. 327. Sheridan Kirk Contracting Co. v. U. S., 52 Ct. of Claims 407.*

The Court: Are those quoted in your brief?

Mr. Haines: No.

The Court: Let me have them again.

Mr. Haines: *Sculley v. U. S., 197 Fed. 327. Sheridan Kirk Contracting Co. v. U. S. 52 Ct. of Claims 407.*

We submit that rule is the appropriate rule where the instruments on which the defendant relies were not only drafted by it, but were typed up 7 to 9 days after complete performance by the plaintiff, which never were submitted to the plaintiff for its approval, and were executed alone by the defendant, and they did finally mail us a copy of them.

I notice that counsel's argument today terminated upon the premise of public policy. We believe, too, that the question of public policy may have some consideration in this case. Let us review very briefly the facts in this case to see in which direction the court should lean, in that public policy is a factor. The produce in question is ordered by the defendant. It specifies a certain grade and quality. It specifies very specifically each and everything that should be

done with it; how it should be harvested, and how it should be wrapped and graded, how it should be shipped, and how it should be iced. It was inspected by its agent at origin. The entire handling of the produce was under the supervision of [54] its field agent. Everything that was done with this produce was done in accordance with the directions and requests of the defendant, and when it left Lompoc it was admittedly prime celery, not only up to 85 per cent U. S. No. 1 Standard, but, as each of the origin inspections show, above that point. Under those circumstances, if something went wrong with the handling of that celery from there on, I think it little behoooves the defendant in this action to try to insert some obstacle, bulletin or regulation, as a shield for non-payment of the produce, which was honestly delivered to it in perfect condition.

I think that perhaps when you speak of public policy, of what the defendant should do, it is to be animated by the spirit that the United States Supreme Court referred to when it said that it should be as interested in protecting the rights of the contractors or one of its bidders as its own rights.

Other than the matters discussed by counsel and myself, of course, there are other matters which are factual in nature. There is an issue as to whether inspection by the government was bona fide. Another issue of fact is as to why this produce did deteriorate, why it deteriorated, what happened to it after it passed into the possession and control of the government. We contend it is quite obvious that

the government, through negligence or otherwise, caused the [55] condition which caused it later to reject it, and that we cannot be held to blame for that condition, and that we are not cut off from receiving our just compensation because of the acts of the defendant in that regard.

The Court: I am going to rule on this motion, and I am going to deny the motion for summary judgment, and proceed to take the proof in this case. I will deny it without prejudice, if for any reason the government wants to renew it at the conclusion of the case, but it will be denied at this time.

Mr. Haines: Mr. Nelson.

MILTON E. NELSON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your name, please?

The Witness: Milton E. Nelson, N-e-l-s-o-n.

The Clerk: Milton E. Nelson?

The Witness: Right.

By Mr. Haines:

Q. Where do you reside, Mr. Nelson?

A. In Lompoc.

Q. And what is your occupation?

A. Branch superintendent of the California Vegetable [56] Growers, Lompoc Branch.

(Testimony of Milton E. Nelson.)

Q. Did you occupy that position in the month of December, 1946? A. Yes.

Q. Now, are you personally familiar with the celery which is the subject-matter of this suit?

A. I am.

Q. Where was that celery grown, Mr. Nelson?

A. That particular patch was grown on the most westerly portion of the Lompoc Valley.

Q. How large a plot was it?

A. There was 11 acres in that plot.

Q. Do you recall how much celery was produced from those 11 acres?

A. There was approximately 11 cars.

Q. Was there any other celery grown in the Lompoc area that season?

A. No, not at that time there was not.

Mr. Grean: I object to this line of questioning, if the court please. I don't see that it is material to this case.

Mr. Haines: It is preliminary, your Honor.

Mr. Grean: You don't buy celery on the growing of it.

Mr. Haines: Particularly, in this regard we want to go into the condition of the celery and the growing conditions of the celery. [57]

Mr. Grean: The inspection certificate is indicative of the condition of the celery.

The Court: Overruled. Proceed.

Q. (By Mr. Haines): By the way, Mr. Nelson, how long have you been connected with the vegetable industry?

(Testimony of Milton E. Nelson.)

A. Well, other than about a year and a half, practically all of my working life, approximately 25 years. I have been with the California Vegetable Growers since '42, and preceding that with the Golden Rush Shippers at Santa Maria, and preceding that time, in my school days, my father being affiliated with the American Fruit Growers in the Santa Clara Valley, I spent most of my time in and out of the business there.

Q. You have been connected with the vegetable industry approximately 25 years, then?

A. That's right.

Q. And you are familiar with the various branches of it, the growing and packing and shipping of it?

A. That's right.

Q. And you had extensive experience, did you not, with celery—the growing and packing and shipping of celery?

A. That's right.

Q. Now, one of the diseases that attacks celery is what they call blight, is it not?

A. That's right. [58]

Q. It also attacks other vegetables, I believe?

A. It does, very definitely.

Q. What do you mean by the term "blight," in connection with celery in particular, Mr. Nelson?

A. Well, blight is especially dangerous to celery, the black and the brown blight. It is a fungus organism that attacks the plant in spores, and is carried to the plant by many ways. In fact, actually there is very little known about blight. It is microscopic in size. It is carried in by wind and rains,

(Testimony of Milton E. Nelson.)

by insects, especially aphids carry the virus, and in appearance it is black and brown mottled spots and patches on the foliage.

Q. You say "in appearance." You mean the appearance of the result of blight?

A. Well, the first stages. The first stages show up small black and brown spots on the foliage. Then because of some atmospheric conditions, weather or otherwise, heating or some other condition such as that, it deteriorates rapidly or grows rapidly, and actually deteriorates into decay, which is what it amounts to.

Q. Where does blight ordinarily originate, in the first instance?

A. Well, as I said before, there is very little known about it. It is an inherent weakness of celery, that blight is there, and it is carried by, as I say, these insects and [59] by wind.

Q. Is it found in the field in the growing stage?

A. Very definitely. It is found in the ground, and it is carried by tools, and it is just actually in most—in fact, there are very few celery fields where there isn't a certain amount of blight in and around them.

Q. Was the condition under which this particular celery was grown favorable or unfavorable for the presence of blight in the growing stage?

A. Well——

Mr. Grean: I object, your Honor.

The Court: Overruled.

The Witness: The fact that there was only the

(Testimony of Milton E. Nelson.)

single celery field in the valley, why, actually, if there are other fields adjacent, why, you have a little concern for the fact that if one is affected, why, the spores will carry into another field. But, as I pointed out, this particular field was in the most westerly portion of the Valley, the growing portion of the Valley, and our prevailing wind is from the west. So it is rather obvious that it could not have been carried from that particular section to the celery or other vegetables.

The Court: Now, have you completed your answer?

The Witness: Yes.

Q. (By Mr. Haines): You have testified that the effect [60] of blight on celery is to eventually cause it to develop decay or rot?

A. Very definitely. In certain conditions it travels faster than others. I have even known it to disappear. When you have it in your field, of course that is one of the big problems for a farmer. He dusts the field, which is a corrective measure for it. But it can be there and not be too noticeable; in fact, not noticeable at all.

Q. Did you personally supervise the harvesting and packing and shipping of the celery in question?

A. I did.

Q. That was under your auspices as the manager of the Lompoc Branch of the California Vegetable Growers?

A. Yes. In fact, this particular section was

(Testimony of Milton E. Nelson.)

rather irregular and I paid a little more specific attention to it.

Q. Were you present when it was inspected by the United States Department of Agriculture?

A. Very much so.

Q. Was it shipped immediately after it was inspected?

A. We have a 7:00 o'clock pull-out on our train there at night, and the car that left on the 14th was packed on the day of the 14th and pulled out at 7:00 o'clock that night.

Q. And the cars inspected on the 16th, when did they leave?

A. They were pulled out on the 7:00 o'clock pull. [61]

Q. On the same day?

A. On the 16th, the same day, that's right.

Q. You say this was an unusual method of handling this celery?

Mr. Grean: If the court please, may we ask that the witness not be led.

The Court: It is a preliminary question. The objection is overruled.

Q. (By Mr. Haines): Who directed you as to the manner of handling this celery in connection with its wrapping and in connection with the type of crate it went into, and any other matters?

A. Well, that was dictated by our sales office, which is located in Guadalupe. They had accepted this order for 1,490 crates of celery, which was to be a special wrapped package, which is irregular as far

(Testimony of Milton E. Nelson.)

as general commercial purposes. That is, usually it is a naked pack, with pack to size, of standard size packing. In this particular instance they required 85 per cent No. 1 grade or better, it had to be packed in a wire-bound container with a stenciled head, and each individual package had to be parchment wrapped, and in this particular instance size had nothing to do with it. We packaged from one-dozen size to five-dozen size in the same package, which is rather irregular. In fact, it renders it useless for any future commercial sale. [62]

Q. You say each individual stalk was wrapped?

A. That's right.

Q. What type of material was used for wrapping?

A. It was a piece of parchment paper. As I recall the size, they ranged from about 15 to about 20 inches square. This particular type paper being parchment and treated with sulphuric material actually made it a non-porous material.

Q. And each stalk was wrapped that way?

A. That's right; wrapped and sealed. When you wrapped the package that way and placed it in a container, and you folded back your edges, you made practically a sealed container for that individual stalk.

Q. In your 25 years of experience in the vegetable industry, did you ever wrap celery like that before?

A. That was my first experience.

Q. Have you ever done it since?

(Testimony of Milton E. Nelson.)

A. No, not in that particular way.

The Court: Were the tops wrapped in the package as well as the stalks or did the package just cover the stalks?

The Witness: The celery stalk itself was clipped to 16 inches in length, and this stalk was rolled into the parchment paper.

The Court: It covered both ends in it?

The Witness: It didn't cover it, but when you placed it in the crate, it had a tendency to fold over on the edges. [63]

The Court: I am speaking of the simple operation, and maybe I haven't made myself clear.

The Witness: All right.

The Court: Here is a bunch of celery, and it has stalks, and you cut it off to 16 inches.

The Witness: Yes.

The Court: And you cut off the top.

The Witness: Yes.

The Court: And you put it on the parchment paper, and you wrap it up.

The Witness: Yes.

The Court: When you wrapped it up, did it cover the part where the leaves are, or did it cover the stalk, leaving the leaves open?

The Witness: No, it covered the entire length of the stalk.

The Court: But did it cover the leaves?

The Witness: Yes, the top of your leaves were practically covered. In other words, there was very little foliage sticking out.

(Testimony of Milton E. Nelson.)

Q. (By Mr. Haines): But did it cover the foliage?

The Court: Was the foliage wrapped into the package?

The Witness: It was totally covered.

Q. (By Mr. Haines): That was at the direction of the government, was it not? [64]

A. That is right.

Q. Mr. Nelson, basing your answer on your own personal knowledge—I will withdraw that question. Do you know Mr. Donald Nelson? A. Yes.

Q. Who is he?

A. He was representing the Quartermaster, and I believe was the purchaser in this instance, representing the government as the purchaser.

Q. Was he present while this produce was being handled?

A. On the initial day, at the initial operation he arrived with the stencil, and supervised the initial packing of the operation, as we were unfamiliar with it altogether. It was our first experience.

Q. He personally was there?

A. That is right.

Q. And dictated the manner in which it was to be wrapped and otherwise handled?

A. That is right.

Q. —and packed into the containers?

A. That's right.

Q. All right. Now, basing your answer, Mr. Nelson, on your personal knowledge, describe the quality and condition of all three carloads when they

(Testimony of Milton E. Nelson.)

were placed on the carrier for shipment at Lompoc. [65]

A. Well, this particular batch of celery, being 11 acres in size, was what we call on the young side. It was even immature, which our inspection certificates here show. The hearts were fairly well formed. In fact, we started harvesting this field on the 2nd of December, terminating the harvest, I believe, about the 22nd; and, in fact, we stalled our harvest, in that we wanted to be sure we had the standard length hearts. There were some crates in the early phases of the harvest with the immature hearts. So it is obvious that when you have immature hearts, your field is on the young side.

Well, actually, that is the way we like to ship this produce, in that when you have a field more or less on the young side, it is resistant to anything that may come along in a defective way, and it assures you of better carrying.

Now, the fact that the inspector—and I recall his name pretty clearly, was Montano—found worm damage and found mechanical injury, but showed no blight or decay in any of his inspections of the three cars.

Now, in my opinion, this particular package, with these stalks wrapped tightly in this parchment paper, non-porous parchment paper, if there were any of these blight spores in the celery, in my experience the only way—there must have been a situation existing or a condition existing along the way causing that blight to travel so rapidly

(Testimony of Milton E. Nelson.)

that it [66] created a decayed condition after seven days.

The Court: Now, wait. I don't understand that answer or that statement. You started out with something, but you didn't finish with it. I don't know that I understand that last sentence. As I understand it, and see if I am right, the only way that this blight could have caused decay damage in this celery was because of some situation which occurred along the way? Is that what you are telling us?

The Witness: That's right. What I am trying to point out, your Honor, and which I have stated before, is that the blight, being even microscopic in appearance, could have been in the plant and not visible at the time of inspection. However, wrapping it in a non-porous tight container, such as this irregular process and procedure was, and then shipping it for seven days, obviously it had some bearing on the rapid growth of this bacterial agent within the package.

The Court: That is your conclusion.

The Witness: Pardon?

The Court: That is your conclusion.

The Witness: That is right. In my opinion, from my experience and knowledge of this blight condition, it had to be something—a change of humidity or a lack of icing, refrigeration, along the way, or something had to develop to cause that blight condition to travel as rapidly as it did. In

(Testimony of Milton E. Nelson.)

fact, your second and third inspection showed decay after seven days. [67]

The Court: That was bad, wasn't it?

The Witness: Pardon?

The Court: That was bad, wasn't it?

The Witness: That is definitely bad.

The Court: All right. Go ahead.

The Witness: In my opinion, and in my experience, I know that the wrapping of that package, either the material or lack of refrigeration, or something that developed along the way out of our control was the cause, because, so far as we were concerned, on the day of shipment there was absolutely no blight in the package.

Q. (By Mr. Haines): You say, Mr. Nelson, there was absolutely no blight at the time it was shipped. To be more accurate, is it not true that all celery has a certain amount of blight, just like every human body has a certain amount of germs?

A. Celery has an inherent weakness for this type of blight.

The Court: There was no blight visible, is what you mean?

The Witness: No blight visible, that is right.

Q. (By Mr. Haines): The fact is there was some unnoticeable amount present?

A. That's right.

Q. Which could, nevertheless, result in a bad condition, [68] so far as blight or rot is concerned, if it was not properly handled en route to wherever it was going?

A. Absolutely.

(Testimony of Milton E. Nelson.)

Q. You also state that in this instance, in your opinion, the manner in which this particular celery was wrapped was a factor? A. I do believe so.

Q. Now, will you give us a little more of your reasoning on that point, Mr. Nelson? Why do you think that this particular type parchment wrapping was a contributing factor in the condition of the celery upon its arrival in Seattle?

A. Well, for one thing, we had shipped several thousand crates at this point, that had gone to all points in the nation, Detroit, Chicago, and in miscellaneous mixed cars, and we at all times failed to have any blight condition exist.

Q. And it was all from this same lot?

A. From this same field, and when this one lot of 1490 crates ended up with a bad decayed condition, it is obvious to me where on the earlier arrivals there weren't any problems of kick-backs, as we call them, and it is hard to understand why in seven days we should have a bad case of blight decay end up in this particular package.

Q. Confining your answer to the specific thing that I directed your attention to, Mr. Nelson, why, in your opinion, [69] do you think that this parchment wrap is a contributing factor?

A. Well, I feel, it being non-porous, it heated the package, and I know there is nothing worse than a heated stalk of celery to rapidly decay.

Q. As a matter of fact, a stalk of celery is as hot as a living organism, is it?

A. That's right.

(Testimony of Milton E. Nelson.)

Q. And requires air?

A. Well, it certainly deteriorates if it doesn't have any air.

Q. What was the effect of this parchment wrap on the celery getting air?

A. Well, as I pointed out, in my opinion, the rapid progress of the decay was due to the heated condition caused by the wrap.

The Court: You haven't answered the question. The answer is obvious. If it was wrapped up, it didn't get air.

The Witness: I see.

The Court: Go ahead.

Q. (By Mr. Haines): Basing your answer, Mr. Nelson, on your personal knowledge of this particular celery, in your opinion, was that celery a type and of a quality and of a condition which made it suitable for export when it left Lompoc, California? [70]

A. That celery was young prime celery. It was crisp, it was fresh, and rather immature.

The Court: You can answer that question "Yes" or "No." Was it suitable for export when it left Lompoc?

The Witness: Yes, very definitely so.

Q. (By Mr. Haines): Did you sell any other celery to the Army out of this same plot during the same season?

A. We sold 180 crates to the Army in a mixed car with lettuce several days preceding this order, for arrival in Chicago.

(Testimony of Milton E. Nelson.)

Q. It went to Chicago?

A. That's right.

Q. Does that take longer than the trip to Seattle?

A. Ordinarily, it is about a day further.

Q. Was there any complaint as to condition on that carload? A. None, no.

The Court: Was it also wrapped?

The Witness: No, it wasn't.

Q. (By Mr. Haines): It was loose packed?

A. Loose packed; standard commercial pack.

Q. In fact, you have already testified this is the only lot you ever treated in this manner?

A. That's right.

Q. Now, in connection with the inspection of this celery [71] after it arrived at Seattle, how long after arrival is it customary to leave the celery stand in the cars before it is inspected?

Mr. Grean: I object to that question. This man isn't qualified to testify as to what the inspection was at Seattle.

Mr. Haines: That wasn't the question. Let me put it this way. I will withdraw the question.

The Court: Do you think this man is qualified to testify to those matters? He is a shipper. He is not an inspector. He is on the shipping end, not on the inspecting end on arrival.

Mr. Haines: My question wasn't directed to the inspection, your Honor. Let me rephrase it, and I will get the element in it that I want.

The Court: All right.

Q. (By Mr. Haines): Do you know of your own

(Testimony of Milton E. Nelson.)

knowledge and from your own experience, how long from the very point of good practice in the handling of celery, how long an interval is usually allowed to take place between the time it arrives and the time that it is inspected?

A. Well, the inspection should be made soon after arrival. There would not be any reason for it to sit around for several days before it was inspected.

Q. In this instance it was shown, and as a matter of evidence in this case it was shown that one of the cars was [72] not inspected until 20 hours after its arrival, another one 31 hours, and a third one 61 hours.

The Court: The third car what?

Mr. Haines: 61 hours.

Mr. Grean: I object to the statement of the evidence as not evidence produced by the plaintiff. If there are indications here as to the arrival time and the time of inspection, there is documentary evidence, and they speak for themselves.

Mr. Haines: It is all in the evidence, your Honor. The defendant has made a motion upon all the records, pleadings and files in the case. The inspection slips are a part of the evidence.

The Court: Do the inspection slips show that?

Mr. Haines: Yes, the inspection slips and the arrival slips.

The Court: Objection overruled. That does not mean that the inspection slips show it, but if coun-

(Testimony of Milton E. Nelson.)

sel contends that, he can show you that. Objection overruled. Go ahead with your question.

Q. (By Mr. Haines) (Continuing): Mr. Nelson, do you consider that under normal and proper practice that that much time should have elapsed between the arrival and the inspection of the celery—referring to the times that I just named here? [73]

A. Well, the fact that these packages were to be exported to Alaska, why, I would think they would proceed with inspection on arrival rather than waiting for several days after arrival, if they expected to ship it.

Q. What would have been the effect upon this celery if some place along the route the doors of the cars had been left open for, say, a matter of five or six hours?

Mr. Grean: I object to that question. There is no showing in this case that anything happened along the line to the cars. To speculate what would happen I think would be immaterial.

The Court: I think that is speculative. Objection sustained.

Q. (By Mr. Haines): What is the effect upon celery if the doors of the refrigerator cars are left open?

A. Well, as with any other vegetable, if a car is going into the icing station and is to be retopped, or something, and the doors are left open, it naturally has an effect upon the refrigeration of the car.

(Testimony of Milton E. Nelson.)

Mr. Grean: I ask that the answer be stricken as not being a matter in issue. As to what would happen if the doors were left open is immaterial.

Mr. Haines: This man is an expert, and he can testify as to what would happen.

The Court: Well, there is no jury here. I will overrule [74] the objection and let the answer stand. We are trying the case without a jury, and unless there is some evidence to connect it up the court is not going to speculate as to what might have happened.

Mr. Haines: What we had in mind in particular, your Honor, is those cases that we cited in our reply, that where the buyer takes possession and title to the goods, then the burden is upon him to show that if anything happened to it en route, it was properly handled.

The Court: We will cross that bridge when we get to it.

Q. (By Mr. Haines): The first of these three carloads, I believe you testified, left Lompoc on the 14th of December, 1946? A. That is right.

Q. And the other two left on the 16th of December? A. That's right.

Q. Now, on the morning of the 16th day of December, did you have a conversation with Mr. Donald Nelson, the gentleman you referred to earlier in your testimony?

A. I don't recall whether it was Don Nelson, or whether it was our sales office, but one or the other

(Testimony of Milton E. Nelson.)

called me about 11:00 o'clock, and wanted to cancel——

Mr. Grean: Just a moment. I object to what was said by the sales office. [75]

The Court: It goes to the weight. He said it might have been Nelson or it might have been the sales office. Of course, that doesn't give the court very much to hang its hat on.

Mr. Grean: We object to any conversations this man might have had with some speculative person.

The Witness: This is important, however, what I am trying to point out.

Mr. Grean: Just a minute. The court will decide what is important in this case. You wait until the court rules.

The Witness: Mr. Haines——

The Court: Just a minute.

Mr. Haines: Just a minute, Mr. Nelson.

The Court: I think we ought to have more certainty than this. What is the court to do, if I admit this testimony. He said he talked either to his sales office or to Nelson.

Q. (By Mr. Haines): What is your best recollection as to whom you talked to on that occasion?

A. Well, let's say I talked to the sales office.

Q. What is your best recollection, not just "let's say"?

A. The fact is that I talked to the sales office two or three dozen times a day, and whether the sales—Nelson had called the sales office, and he, in turn, called me to [76] cancel these cars.

(Testimony of Milton E. Nelson.)

Mr. Grean: I object to the statement as hearsay.

The Court: The statement may go out. Is it your best recollection that you talked to the sales office?

The Witness: Let's put it that way, yes.

The Court: The objection is sustained.

Mr. Haines: We will withdraw the question, then, your Honor. That is all.

Cross-Examination

By Mr. Grean:

Q. Mr. Nelson, what sort of blight were you referring to when you were testifying about the effect of blight? Was that early blight, or late blight, or bacterial blight?

A. Well, as far as I know, it evidently was a bacterial blight. It was a fungus blight.

Q. Isn't early blight and late blight also a fungus blight?

A. Well, I do not profess to be a biologist. I am just a grower and a shipper, and I know blight when I see it, and we proceed to do something about it.

Q. But you don't know what kind of blight it is?

A. The fact——

Mr. Haines: That is objected to on the grounds it is assuming a fact not in evidence. He did not see the blight in Seattle. [77]

The Court: Objection overruled. This is cross-examination. He says there is always some amount of blight in every celery crop.

Q. (By Mr. Grean): Suppose I told you that

(Testimony of Milton E. Nelson.)

the inspection certificate rendered at Seattle on behalf of the plaintiff in this case showed watery soft rot. What type of blight would you say had caused this condition?

Mr. Haines: Well, I would suggest, counsel, you show him the certificate and let him study it.

Mr. Grean: I will be happy to.

The Court: The objection is overruled, if there is an objection.

The Witness: Will you, please?

Q. (By Mr. Grean): Yes. Suppose the inspection certificate showed it to be watery soft rot. What sort of blight would you say would be the cause of that?

A. Well, to tell the truth, I couldn't answer that question. I believe it would be a bacterial type blight that would cause it to develop like that. However, there was no evidence of that when the package left Lompoc.

Q. Just a minute. You will please confine your answer, if you will, to my questions. A. Yes.

The Court: The latter part of the answer may go out, beginning with, "However, there was no evidence." [78]

Q. (By Mr. Grean): I call your attention to a condition commonly known as bacterial soft rot, and ask you if you know what kind of blight causes that condition?

A. As far as I know, it is a fungus. It is a pathogenic organism which attacks the plant, and, as I pointed out, microscopic in nature, and has a

(Testimony of Milton E. Nelson.)

tendency to travel under certain humid conditions, and it creates decay, but does not start out as a decay.

Q. Could it be present without being seen?

A. Absolutely; absolutely.

Q. In other words, it could be there and inspected, and still not show in the inspection because it would be invisible?

A. Absolutely. That is an inherent weakness in celery. It is microscopic in appearance, as we have pointed out. It is very possible it could have been there. However, it takes a situation or a condition——

Q. Now, just a minute.

Mr. Haines: I believe he can explain that answer, your Honor, and I would like him to complete it.

The Court: Yes, he may complete the explanation. He says it can be present and not seen. What else do you want to say about it?

The Witness: It is not visible to the eye. It would be microscopic, and I might say to the gentlemen in the first [79] row, who are very familiar with this phase of blight, specialize, in fact, in blight, know it can be available in the plant and not visible to the human eye. There is no reflection on the——

The Court: You have said it in a half a dozen different ways, and you have said it can be present and not be seen. Isn't that all? Do you want to add anything else?

(Testimony of Milton E. Nelson.)

The Witness: I would say that it is no reflection on the particular inspector that he missed it, because it can't be seen.

The Court: That may go out.

Mr. Haines: You were making some comment on its development under certain conditions.

The Witness: That's right. And I have just answered this gentleman's question, "Was it visible?" And I say that it is possible that it wasn't visible.

Mr. Grean: Is this to be voluntary?

The Court: No, it is not to be. Let's go ahead. Proceed with your questioning.

Q. (By Mr. Grean): Assuming that blight spores were there and could not be seen, under normal circumstances how quickly could that develop, according to your experience, if you know?

A. Well, as I before have pointed out, depending on conditions, and with such as this tightly wrapped non-porous [80] paper around it, it could have developed very much faster, at a faster rate.

Q. Didn't you testify that this was your first experience with this wrap?

A. Yes, with this type of paper.

Q. What type of paper was it?

A. It was a parchment paper, and it was an oil base paper.

Q. I know what type this is. What type wrapping have you done?

A. The celery wrapping we have done was in a pliofilm container of a cellophane nature, a clear, transparent package.

(Testimony of Milton E. Nelson.)

Q. Porous?

A. It has a tendency to breathe, yes.

Q. Pliofilm does have a tendency to breathe that parchment does not?

A. Pliofilm is the material they are using today for the packaging of celery, and it has a tendency to breathe.

Q. For what purpose was the celery wrapped or packaged in the cases you are speaking of?

A. Well, actually for consumer purposes; the matter of sales, retail sales.

Q. Isn't it a fact that it is wrapped for preservation? A. That could be a part of it, yes.

Q. Wasn't that the reason for the wrapping in the case [81] that was shipped to Seattle?

A. We presumed it to be.

Q. What would you say would be the ideal temperatures for the transportation of celery under ideal conditions?

A. Well, as far as I know, if your refrigeration was low enough to keep the normal cool temperatures, why, certainly, in my experience, with the blight tendency of celery, in seven days, unless something very irregular happened——

The Court: No. Wait a minute. Don't argue. He asked you what would be the ideal temperatures for the transportation of celery. Do you know?

The Witness: As I pointed out, I am not proficient at knowing what the refrigeration temperatures should be in travel.

(Testimony of Milton E. Nelson.)

The Court: Then your answer is, "I don't know"?

The Witness: I don't know.

The Court: All right. Let's get on, and not roam around with all of this.

Q. (By Mr. Grean): While employed by the California Vegetable Growers in this time, did you have occasion to enter into other contracts with the government?

A. Not to my knowledge. You mean with this patch of celery?

Q. No, for any produce.

A. We shipped many cars of lettuce purchased by the [82] Army.

Q. In other words, you have had very many dealings with the government?

A. Very many, that's right.

Q. How long did it take to inspect the celery at the point of origin?

A. How long did it take?

Q. Yes.

A. Well, it took approximately three hours to pack the car, and the inspector was there at all times.

Q. Well, the inspection started on the 14th, did it not? A. Right.

Q. How long did the inspection which was started on the 14th take? It was not completed until the 16th?

A. Well, there was one car that was shipped on the 14th.

(Testimony of Milton E. Nelson.)

Q. I beg pardon?

A. There was one car that was shipped on the 14th; that was shipped, loaded and pulled on the 14th.

Q. I call your attention to the inspection certificate which is Plaintiff's Exhibit 2, Certificate No. 65048, and 65049, which is Exhibit 1. This states, "Inspection begun 3:30 p.m., Dec. 14, 1946." You were there at the time?

A. Right; yes. [83]

Q. "Completed 10:30 a.m., December 16, 1946."

Mr. Haines: What is the question?

The Court: He has shown the exhibits to the witness. We haven't got a question yet.

Mr. Grean: I believe the witness was asked why, if inspection was started on the 14th, it was not completed until the 16th.

The Witness: Well, how about the first car that left on the 14th?

Mr. Grean: I am asking you in regard to these two cars.

The Court: Can you tell us about that?

The Witness: Yes, I certainly can. These two cars here, the order was placed with us on the evening of the 13th, or possibly the morning of the 14th. It was a physical impossibility to pack those three cars in a single day, so it is the packing procedure to complete what you can. In the case of this one car, having been shipped on the 14th, it was loaded and inspected, and I think you will find this inspection certificate to show the 14th completed.

(Testimony of Milton E. Nelson.)

And on these particular cars, it was evidently what we call a baby load, that is, there was probably a portion of each of these cars completed on Saturday night, the score was taken on these cars on Saturday, and then they were completed Monday morning. And if you will check this termination, it shows [84] it was 10:30 a.m.

Q. 10:30 a.m., December 16th, and 9:00 a.m., December 16th. Now, was the celery that was being packed at that time kept under refrigeration?

A. Pardon?

Q. Was the celery that was being packed and inspected at that time kept under refrigeration?

A. Certainly.

Q. From Saturday night to Monday morning?

A. Certainly. The number of crates that was placed in the cars were blown with top ice.

Q. Blown with top ice?

A. That's right.

Q. How about the ones that had not yet been loaded?

A. Well, when we terminate our packing at the end of a day, probably on Saturday night, we have nothing left at the end of Saturday night. There is no loose stuff or produce on the floor carried over the week-end. We don't like to do that.

Q. Where was the balance which was completed by 9:00 a.m. on December 16th in the meantime?

A. The balance of that produce was still in the field, not having been completed as to harvesting.

Q. What time do they start working in the field?

(Testimony of Milton E. Nelson.)

A. Well, in this particular case, where it was December, [85] they probably started at 7:00 o'clock in the morning.

Q. And the balance of approximately 500 wire-bound 16-inch crates were harvested, wrapped, packed, and loaded in the car by 9:00 a.m.?

A. On one car, that is what it says, your baby, which is two hours. Of course, we don't know off-hand how many crates was in the car on Saturday night.

Q. Was this celery washed?

A. Absolutely.

Q. Where was it washed?

A. At the packing plant on West Laurel Avenue, Lompoc.

Q. In the packing plant? A. Yes.

Q. Not at this western field where this celery crop was located?

A. That is where the harvest took place.

Q. But it was actually washed at the packing plant? A. Yes, sir.

Q. Tell me is it possible in washing to spread blight spores, in the spraying?

A. In my opinion and experience, it probably could be.

Mr. Grean: That is all.

Mr. Haines: That is all.

The Court: Step down.

(Witness excused.) [86]

Mr. Haines: The plaintiff rests, your Honor.

Mr. Grean: At this time, if the court please, the defendant renews its motion, and at this time upon the further ground that the plaintiff has not shown a prima facie case. He has not overcome the inspection certificates, which are a part of the record in this case. He has not by any means shown any act on the part of the defendant which would in any way cause the deterioration of this celery, other than its own inherent values. And further than that, your Honor, because of the fact that the carrier, contrary to the statement of the plaintiff, is not the buyer's agent to accept the goods, as corresponding with the contract, even though he may be his agent to receive and transport the goods.

The Court: The plaintiff does not intend to offer any proof as to the conversations between the plaintiff company and this purchasing agent?

Mr. McIntyre: We can call Mr. Nelson as an adverse witness under what is the equivalent of Section 2055 of the California Civil Code for cross-examination. We intended to bring that out on cross-examination.

The Court: Well, you are trying your case, and I don't want a law suit to be a game. I am trying to find out what the facts are. You made the contention that this purchase order was written after the celery was shipped, and it did not comply with the oral agreement. You have offered no proof [87] of that at all. In the present state of the record you are going to have to rest entirely on the purchase orders in the shape they are in.

Mr. McIntyre: Could I have that repeated, your Honor?

The Court: You made the contention, as I understood you, that the purchase order did not comply with the oral understanding. You made a point, which I made a note of, that even if this was a contract, a unilateral contract, a contract of this sort must truly reflect what the meeting of the minds was. I assume, therefore, that you contend that these purchase orders do not reflect what the actual meeting of the minds was, between your company and some agent of the government, but you have rested without any proof of that.

Mr. McIntyre: Well, your Honor please, of course the difficulty in trying a case like this is the fact that I do not believe any of us can hold all the facts that were stipulated to in the mind all at one time. Here is what our contention is. Our contention is based not only on the evidence of Mr. Nelson, but upon the stipulated facts, and including these purchase orders, and including these abstracts which were introduced in evidence this morning. Our contention is that that celery was purchased F.O.B. origin, Lompoc; that on top of being purchased under that condition, that it was also purchased subjection to inspection at origin. [88]

The Court: Which you claim was Lompoc?

Mr. McIntyre: Which we claim was Lompoc.

The Court: You want to base those contentions entirely on the written documents?

Mr. McIntyre: And the stipulated facts. The stipulated facts, your Honor, admit that the prod-

uce more than met the requirements at Lompoc. The requirements were 85 per cent. The three certificates, I think, show in each instance something higher than that.

The Court: Let me get your contention now. In other words, you are basing your case, then, on the written purchase orders which are Exhibits G, H and I, and that because they state, "Delivery F.O.B. origin," that, therefore, the destination was the origin?

Mr. McIntyre: That is correct.

The Court: And the destination was Lompoc?

Mr. McIntyre: I think that is right.

The Court: Let me finish.

Mr. McIntyre: I beg pardon.

The Court: And if the purchase orders, Exhibits G, H, and I, provided for inspection and acceptance at destination, that meant acceptance and inspection at Lompoc?

Mr. McIntyre: That is right.

The Court: And since the certificates of inspection showed the celery was O. K. at Lompoc, therefore you have [89] complied? That is your contention?

Mr. McIntyre: That is it in part. I think there were a few more facets to it. To begin with, it is our contention that the only inspection called for, so far as the parties were concerned, was the Lompoc inspection.

Now, I recall counsel making some statement that the inspection at Lompoc was for quality and the inspection at Seattle was for condition.

I think that it is very apparent on the face of it that that statement is a bit on the ridiculous side. If, for instance, at Lompoc the inspection showed there was rot in this celery, it would have been rejected there. I don't believe we can be asked to believe anything else, so the inspection at Lompoc was not only for quality, but for all purposes.

The Court: We are getting at something else. My question was whether you want to rest your case or want to offer proof as to anything other than this document. In other words, what you are doing is basing your entire case upon the wording and the legal interpretation the court will place on Exhibits G, H, and I.

Mr. Haines: I think the point Mr. McIntyre brought out here is important. I think we want also to refer to these abstracts of offer and acceptance that were offered this morning. That shows, upon the face of that, as it does upon [90] the face of the purchase orders, that the inspection was supposed to be at Lompoc.

The Court: Where do you see that?

Mr. Haines: I am referring to the abstract of an offer—I don't know what the number of it is.

The Court: Yes, I have them before me. They are J, K,——

Mr. Haines: "Inspection points, Seattle," and then beyond that to the right——

The Court: Which one are you referring to now? Abstract of Offering or Bids Received?

Mr. Haines: I am referring to the Abstract of

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Mr. Haines: "Inspection points, Seattle," and then beyond that to the right—

The Court: Which one are you referring to now? Abstract of Offering or Bids Received?

Mr. Haines: I am referring to the Abstract of

Offering in connection with purchase order No. LA 8261.

The Court: All right. Let me find it.

The Clerk: That is Exhibit J, your Honor.

The Court: All right.

Mr. Haines: You will note that to the right of "Inspection Points" there is the word "Seattle," and then to the right of that "Market Center or N.M.C."

Now, we ascertained——

The Court: All right. I have found the place you are referring to now, "Inspection Points." Go ahead.

Mr. Haines: ——"Seattle," and then to the right of that, "Market Center or N.M.C." Now, we were informed by counsel this morning that "N.M.C." means Naval—What is [91] the rest of it?

Mr. Grean: Navy Markets Center.

Mr. Haines: ——Navy Markets Center. We contend that the Market Center up above is the Market Center in Los Angeles, which placed this order, and that it had to be, and it was the Los Angeles Market Center which was the contracting agency.

The Court: I have your contention. Now I will go back to what I said. Do you want to rest your case or do you want to not rest your case?

Mr. Haines: I would like to call Mr. Nelson, Donald Nelson to the stand, and ask him some questions.

The Court: All right. I will permit the plaintiff to reopen its case, and as to your motion, you can remake it when the plaintiff rests.

Mr. Grean: Thank you. May we have a short recess, your Honor.

(A short recess was taken.)

The Court: By the way, Mr. Nelson can be called under Rule 43(b), which is the equivalent of Section 2055 of the California Code of Civil Procedure, and be examined under cross-examination.

Mr. Haines: Mr. Donald Nelson. [92]

DONALD L. NELSON

called as a witness under the provisions of Rule 43(b), having been first duly sworn, was examined and testified as follows:

Direct Examination

The Court: Is this Mr. Nelson any relation to the other Mr. Nelson?

Mr. Haines: None whatsoever.

The Court: Except that they have the same last name.

Mr. Haines: Yes. They are both of Scandinavian ancestry.

The Clerk: State your name, please.

The Witness: Donald L. Nelson.

Q. (By Mr. Haines): What is your occupation, Mr. Nelson?

A. I am a purchasing agent for the Army.

Q. Did you occupy that position in the month of December, 1946?

A. I was then known as a marketing specialist.

Q. Where were you located in December of 1946?

A. Guadalupe Field Buying Office.

(Testimony of Donald L. Nelson.)

Q. How is that?

A. Guadalupe Field Buying Office.

Q. Did you enter into negotiations with the California Vegetable Growers during that month and, more particularly, on the 13th day of that month in reference to the purchase of 1,490 crates of [93] celery?

A. I did.

Q. With whom did you negotiate that contract, Mr. Nelson?

A. What was that question again?

Q. With whom did you negotiate that contract?

A. I, of course, don't recall, but I think it was

A. L. Turner.

Q. And Mr. Turner was sales manager——

A. That is correct.

Q. ——for the California Vegetable Growers?

A. Yes.

Q. Where did these negotiations take place?

A. Well, I imagine either on the phone or in his office.

Q. Do you recall what was said by you and what was said by Mr. Turner on that occasion?

A. I do not.

Q. You recall that you asked to be supplied with 1,490 crates of celery?

A. I have seen records and I have refreshed my memory to that extent.

Q. Have you seen any other records that have refreshed your memory as to any other details of the transaction?

A. To what do you refer?

(Testimony of Donald L. Nelson.)

Q. Well, I refer to the type of celery that was discussed? [94]

A. That information is on the abstract, yes.

Q. And the manner in which it was to be wrapped?

A. That's right.

Q. And the manner in which it was to be shipped?

A. That's right.

Q. And the manner in which it was to be iced en route, and the inspection of the celery at Lompoc?

A. The inspection was the normal inspection procedure, calling for an origin inspection for grade and a destination inspection for condition.

Q. The inspection that I am referring to is the inspection at Lompoc?

A. That was a grade inspection.

Q. There was an inspection at Lompoc?

A. Sir?

Q. There was an inspection at Lompoc?

A. You have supporting certificates?

Q. Well, I am just asking you.

The Court: Do you know of your own knowledge whether there was an inspection?

The Witness. Sir?

The Court: Do you know of your own knowledge whether there was an inspection?

The Witness: Yes.

Q. (By Mr. Haines): And that was conducted by the [95] United States Department of Agriculture?

A. That's right.

(Testimony of Donald L. Nelson.)

Q. And that inspection showed the celery to be equal, or more than equal, to the grade required?

A. That is very true.

Q. And also showed there was no blight present?

A. None was indicated.

Q. You yourself were present, were you not, when a portion of the goods was handled.

A. That is the normal procedure. I would be there.

Q. You were there?

A. I would be there, yes, sir. I do not recall that, but I would be. That is my job.

Q. To see that it was crated properly and wrapped properly?

A. That's right.

Q. Do you recall the particular wrap that was used on this particular occasion?

A. What was that?

Q. Do you recall the wrap that was used on this particular occasion?

A. That's right.

Q. What was it?

A. Well, it was a parchment paper wrap.

Q. What is the characteristic of parchment, so far [96] as being porous or non-porous?

A. Well, it retains its strength under moisture. Frankly, I don't know much about paper making, and I am not an expert on that point.

Q. You don't know whether it is porous or not?

A. No, I don't.

Q. It has an oil content, does it not?

A. Sir?

Q. It has an oil content, does it not?

(Testimony of Donald L. Nelson.)

A. Not to my knowledge.

Q. Well, you know, of your knowledge, that the goods in question were inspected at Lompoc?

A. I am slightly hard of hearing. I will have to ask you to speak a little louder.

Q. I say, you know, of your own knowledge, that the celery was inspected at Lompoc?

A. That's correct.

Q. And you know the inspection did not show any blight or rot?

A. That's correct.

Q. And you know the goods were wrapped and shipped and packed in accordance with your own instructions?

A. That's correct.

Q. And that the icing was in accordance with your own instructions? [97]

A. That's right.

Q. Do you know whether the goods were inspected at Gerber, California, en route?

A. They would not be inspected. They would be re-iced at that point.

Q. I call your attention to the War Department Purchase Order, Government Order No. 8260.

The Court: That is Exhibit H?

Q. (By Mr. Haines): Exhibit H, and I call your attention to the following language, "Unit price includes top ice. To be re-iced at Gerber. Federal-State Inspected."

A. Federal-State Inspected.

Q. That's right?

A. That is another sentence there in another paragraph, not included in the icing instructions.

(Testimony of Donald L. Nelson.)

Q. That is your conclusion, is it not, Mr. Nelson?

A. Knowing the terms of that contract, that is more than a conclusion. That merely calls for re-icing at Gerber, re-top-icing, rather.

Q. Did you re-dictate the terms of this contract?

A. No, sir; they are standard terms.

The Court: Had there ever been any conversation between you and Turner that the celery was to be inspected by State or Federal agents at Gerber?

The Witness: No, definitely not. [97a]

Q. (By Mr. Haines): But you did have a conversation with Mr. Turner about the inspection at Lompoc?

A. We requested inspection at origin. That was the deal.

Mr. Haines: May I have the last question and answer read, please, your Honor?

The Court: Yes.

(The record was read.)

Q. (By Mr. Haines): Whom did you request the inspection of—Mr. Turner?

A. That was a part of the terms of the contract for sale.

Q. Now, you can answer that question, Mr. Nelson. Did you request that of Mr. Turner?

A. According to our operating procedure—

Q. Never mind your operating procedure. Just

(Testimony of Donald L. Nelson.)

answer the question. Did you request of Mr. Turner the inspection at Lompoc?

A. Undoubtedly, yes.

The Court: By that you mean you do not have any personal recollection of it?

The Witness: No.

The Court: You are relying on what your practice would have been?

The Witness: That's right. Our practice is uniform. [98]

Q. (By Mr. Haines): Did you have any discussion with Mr. Turner about an inspection at Seattle?

A. I don't recall. He was familiar with the terms of our contract, however.

Mr. Haines: I move that be stricken as not responsive and as an opinion and conclusion of the witness.

The Court: It may go out, that statement that he was familiar.

Q. (By Mr. Haines): Now, Mr. Nelson, did you have a conversation with either Mr. Turner or with the Mr. Nelson who was on the stand here this afternoon on Saturday, the 16th day of December, about canceling this shipment?

A. I don't recall any such cancellation.

Q. Do you recall talking to either Mr. Turner or Mr. Nelson, and telling one or the other of them that something had occurred and that you wanted to cancel the two carloads, and you were advised by

(Testimony of Donald L. Nelson.)

them it was too late, the celery had all been harvested?

A. No, sir, I do not recall that.

Q. You wouldn't say that you did not have such a conversation?

A. I said that I did not recall.

Mr. Grean: If your Honor please, I object.

The Court: Objection overruled.

Q. (By Mr. Haines): Do you recall any unusual situation [99] arising in reference to this particular purchase of celery? A. No, I don't.

Q. Did you ever purchase any other celery wrapped that way from California Vegetable Growers?

A. I don't recall whether we did or not.

Q. Did you ever purchase celery wrapped like that from anyone else? A. Oh, yes.

Q. Who was that, Mr. Nelson?

A. You mean in your immediate locality?

Q. Yes.

A. Juanita, or not—the name has escaped me up there—Rosemary or Oceana Packing Company. That is a fact.

Q. You are familiar with the fact that is not the usual practice—— A. That's right.

Q. ——of handling celery in commercial channels? A. That's right.

Q. Ordinarily it is loose packed?

A. That's right.

Q. The purpose of that is so that the celery gets ventilation; isn't that true?

(Testimony of Donald L. Nelson.)

A. The purpose of the wrap?

Q. The purpose of the loose wrap, the loose pack? [100]

A. Since you use liners a good deal of the time, I don't think that is the purpose of that.

Q. What do you mean by that, by "liners"?

A. The crate liner, the paper.

Q. That is one sheet between layers, is it not?

A. No, it completely encloses the pack.

Q. But it does not enclose each and every stalk?

A. That would be a protection to the stalk itself.

Q. What kind of paper do they use in the ordinary liner?

A. There are various kinds. They use a parchment or a wax paper.

The Court: By "liner" you mean a piece of paper that is inside of the pack and covers the bottom and the sides and the top?

The Witness: That is right.

The Court: And completely encloses the vegetable that is put in this lining?

The Witness: That's true.

The Court: Is the liner customarily used on a loose pack?

The Witness: There are some that use them and some that don't.

The Court: I see.

The Witness: It depends on the [101] individual.

Q. (By Mr. Haines): Now, so far as California Vegetable Growers is concerned, they furnished you

(Testimony of Donald L. Nelson.)

with the quantity of celery that you indicated in your negotiations? A. That's right.

Q. There was complete agreement as to the price of the celery? A. That's right.

Q. And the celery was handled exactly as you dictated it should be handled, so far as wire crated, wrapped—— A. Correct.

Q. ——shipping and icing? A. Correct.

Q. The ultimate destination of this celery was not Seattle, Mr. Nelson, was it? It was to go to Alaska?

A. The only destination we had was Seattle.

Q. Oh, now, wait a minute. You knew that the ultimate destination of this celery was not Seattle, it was Alaska?

A. At that time, naturally, security was still in effect. All we had was a code mark.

Q. You knew it was going on a boat at Seattle?

A. Yes.

Q. So you knew Seattle was not the ultimate destination; isn't that correct?

A. That's correct.

The Court: What difference does that [102] make?

Mr. Haines: It goes to this question of destination that the defendant is laying so much stress on.

The Court: You mean you are trying to prove now that the word "destination" used in Exhibit H, for instance, meant the ultimate destination other than Seattle?

Mr. Haines: No, your Honor. I am not trying

(Testimony of Donald L. Nelson.)

to prove that. I am simply trying to prove that the word "destination" is not narrowed down to the literal meaning of the final point of consumption. We contend "destination" is where title and possession and control took place. They contend it was some other point.

The Court: All right.

Mr. Haines: Their contention is that "destination" was a trans-shipping point.

The Court: All right. Proceed.

Mr. Haines: It also interprets the regulation that they have cited and depend upon when they talk about the necessity of inspection at destination. That is, as we stated in our argument, that is the very nub or the crux of this argument as to what is the meaning of the word "destination." It does not mean, according to the defendant's own contention, Seattle.

The Court: All right. Proceed. I get your point.

Mr. Haines: That is all.

The Court: You may step down, unless Mr. Grean wants [103] to ask you some questions.

Mr. Grean: You may step down.

(Witness excused.)

Mr. Haines: Now, your Honor, I would like to make one or two observations in reply to the renewed motion of counsel.

The Court: Now, he withdrew his motion because I permitted you to reopen your case. The status is you are still on your case. Do you now rest?

Mr. Haines: We rest.

Mr. Grean: At this time, your Honor, I will renew my motion under 41(b).

The Court: Mr. Grean, how long will it take you to put on your proof?

Mr. Grean: It will not take very long.

The Court: I am going to overrule your motion. This is not an open and shut proposition, but rather than spend time on the motion I would rather hear the proof. On appeal, on these motions of summary judgment, if the Circuit Court finds there should be some issue of fact to be decided by the court, and the court grants your motion for summary judgment, then you are in trouble. Rather than do that, we will go through this and find out whether there is merit to your case.

Mr. Grean: We will do that, if the court desires. I would like to make this statement, however, with regard to the [104] plaintiff's case: We have stipulated that the celery was purchased, that it was shipped, that it was inspected, that it was inspected again at destination, and there it was rejected.

The Court: I understand that.

Mr. Grean: There has been no showing of wrongful rejection. The certificates speak for themselves. The indication of the witness, the so-called expert witness of the plaintiff, has been to the effect that there are spores present which may germinate.

The Court: There is no showing of any oral agreement other than or different than the purchase orders.

Mr. Grean: That is true, your Honor, and for that reason I feel that the presentation of the defendant's case will rest merely upon a showing of the validity of the certificates of inspection, and as to what they mean.

Mr. Haines: I am constained to reply to at least two things counsel says. I think the trouble with counsel's argument is that his major premise is incorrect. The burden of proof is not upon us as to what occurred after they took possession, and that is the purport of the cases we have cited, and he hasn't cited any cases to the contrary. Under the Rivers Brothers case, and the other authorities we cited, our burden is met when we show that the goods were acceptable for export when he passed title to them and passed control [105] and possession.

The Court: I haven't read those cases, but I will wager those cases are cases in which there was not a contract which provided for a final inspection at some place of destination. In other words, you take the ordinary sales contract, where you don't have a written agreement but you have a sale of the goods, then I think the law is—and I am speaking off the cuff now, because I intend to read the cases before I decide this case, and I haven't had a chance to do that—in the ordinary case where you haven't a written agreement, I would apprehend the law to be when delivery is made, the sales are complete, and I apprehend that your cases are that kind of case; or where the goods are shipped from California and there is no real means for

inspection at some particular place, and maybe no chance for inspection until they arrive. But here is a case where, in the absence of an oral contract, the only contract I can rely upon is the written purchase orders, and that then becomes a question of law, as to what is meant by "Place of origin," and what is meant by "Place of destination," and what is meant by the phrase "Subject to inspection and acceptance at destination."

Mr. Haines: That is correct.

The Court: Now, it seems to me that the case is going to hinge pretty much on what that purchase order means. [106]

Mr. Haines: I think that the main thing that we are contending for, your Honor, is that we cannot be held responsible for something that happened or might have happened after it passed beyond our control.

The Court: If this does not mean what it says, if the statement "Inspection points—Inspection and acceptance at destination," if that means the government had the right to inspect and accept or reject at Seattle, then I don't think you can urge that point.

Mr. Haines: Oh, for instance, your Honor—

The Court: But if that means "Inspection and acceptance at Lompoc," according to one of your contentions, that Lompoc might be the place of destination because of the origin, taking your point on that score, or if under the law title passed to the government at Lompoc and the risk of the shipment was on the government in some way or other,

so that this phrase does not mean what it purports to mean, then maybe you have a point there.

Mr. Haines: Your Honor, what about a willful act on the part of the government, or if they deliberately let that celery stand for 61 hours on the track, with the doors open? Are we responsible for that?

The Court: I take it that every contract has an implied covenant of good faith. Every contract has an implied covenant of good faith, whether written in the contract or not. It is [107] implied. I take it, therefore, that the phrase "Inspection and acceptance at destination" would mean that there would be a good faith inspection and a good faith acceptance or rejection. I think, however, the burden of proving any lack of good faith would be on the plaintiff, if the defendant proves, and here it has been proved by the stipulation, that there was an inspection at Seattle. Doesn't that seem logical?

Mr. Haines: Well, I believe that it is correct so far as your Honor has gone, but I don't think it goes the entire way. I don't believe it gets down to what I see to be the fundamental point, and that is the burden of proof as to what happened after title and possession passed to the defendant.

The Court: Let's take the government's case. The government is going to contend that the contract says "Inspection and acceptance at Seattle." The government says they rejected it at Seattle. The fact they didn't put the proof on doesn't make any difference, because it is in the stipulation. It

seems to me if you contend there was a bad faith rejection or something was done deliberately by the government to make possible this inspection and rejection, the burden then shifts to you to prove it.

Mr. Haines: I use that merely as an example to show where the burden of proof lies. I just added the "willful act" as an example of the fact that you can't go all the way [108] and say that the burden is entirely upon the plaintiff all the way, and that he is responsible for the goods until they reach Seattle and until they are inspected there, and that because of that typed-in phrase "Inspection at destination," that that is all the government has to do, and that then they can sit down and from there on the plaintiff has to prove what happened to the goods, after we no longer controlled it. I say that from that point on the burden shifts to the government.

The Court: I have your point, and I intend to read your cases. Let's go ahead, Mr. Grean.

Mr. Grean: On that particular point, your Honor, does the plaintiff wish us to believe there is something mystical in the word "destination"? I can't follow their reasoning there.

The Court: Let's call your witnesses.

Mr. Grean: Mr. Stay, please.

PHILLIP V. STAY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Phillip V. Stay, S-t-a-y. [109]

Direct Examination

By Mr. Grean:

Q. What is your occupation, Mr. Stay?

A. At present I am assistant chief of the Bureau of Shipping Point Inspection, California Department of Agriculture.

Q. How long have you held that position?

A. Approximately 10 years.

Q. What was your occupation before that?

A. Well, I started in the inspection work as an inspector in June, 1924, and worked as an inspector, and as an inspector in charge, and supervising inspector, and to the position that I hold at present.

Q. During that period of time, Mr. Stay, have you had occasion to inspect celery? A. Yes.

Q. Have you had occasion to learn the proclivities of celery? A. Yes.

Q. What would you say would be the ideal temperature for storage or transportation of celery?

A. According to government holding tests and data, it would be in the middle thirties.

Q. What advantage or disadvantage is there in a parchment wrap of each individual stalk of celery?

(Testimony of Phillip V. Stay.)

A. I don't believe I could truthfully comment on that. To my knowledge, there have been no holding tests that would [110] show one method being superior to another.

Q. Isn't it true that celery purchased by the government and wrapped for export is wrapped in that manner because of the staying quality?

A. I presume that is the reason, because all of it is wrapped that is going for export.

Q. I show you a United States Department of Agriculture inspection certificate No. D-43243, and ask if you can see there——

The Court: What exhibit number is it? Give us the number for the record.

Q. (By Mr. Grean): Defendant's Exhibit No. E, and ask what condition that indicates with regard to the produce to which it relates?

A. This is rather difficult to read. It shows celery fresh, crisp, tops mostly green, some turning yellow to yellow. Blight ranges from 4 to 17% in many crates, averaging 6%. Decay irregular. Most crates ranges from 5 to 20%, averaging approximately 7%.

Q. Is that condition suitable for export?

A. I would think not.

Q. Is that condition within the tolerances permitted by the standard of the United States Department of Agriculture?

A. No, it is not.

Q. I now show you Defendant's Exhibit F, which pertains [111] to the same car, and is an inspection made on behalf of the plaintiff on De-

(Testimony of Phillip V. Stay.)

cember 26, 1946, approximately three days after this. I call your particular attention to temperature of product as related on December 26 in that inspection certificate.

A. This shows the temperature of the product in the bottom layer 33 degrees; top layer 35 degrees Fahrenheit.

Q. Is that favorable storage temperature for celery? A. Yes.

Q. Would you say it was the most favorable?

A. Yes. This is in the middle thirties. I would say it was most favorable.

Q. I now ask you to refer to the inspection certificate made at point of origin on the same car. Will you please read—before you do that, while I am doing this, will you please read the condition report at that time on that last certificate?

A. "Stock free from decay, is fresh and crisp. Tops mostly green, few turning yellow. Damage from discoloration following bruising averages 1%. Decay in tops ranges from 8% to 35%, averages approximately 20%, chiefly bacterial soft rot, mostly in initial stages, many advanced. In many stalks decay in tops is following blight. Decay in lower main branches ranges in most samples from 4% to 12%, in some samples none, and averages 5% chiefly watery soft rot, mostly [112] in initial stages."

Q. I now ask you this question: Admitting that there was no decay on December 23rd—I beg your pardon—on December 14th, at the time this particular car was shipped, December 14th or 16th,

(Testimony of Phillip V. Stay.)

that the icing conditions were ideal, that it arrived on schedule, December 23rd, how do you account for the failure of the celery to pass condition by reason of decay, with reference, Mr. Stay, to the watery soft rot or bacterial soft rot which is mentioned therein?

A. Well, this can be explained by the fact that the bacterial soft rot and the watery soft rot are secondary attacks of the organism following blight and bruises or any puncture of the epidermis of the leaves or the branches of celery. These types of decay need some mode of entrance other than on healthy tissue.

Q. Is it possible for that stage of the decay to carry to that extent under ideal icing conditions and an inspection at origin showing no decay?

A. We have had several in the course of years that would be as bad or worse.

The Court: In other words, your testimony is that this kind of decay can develop even when the car is properly iced?

The Witness: That is right.

The Court: It is a decay that progresses [113] under temperatures of 30, 33, 35 degrees?

The Witness: It will, yes.

The Court: Of course, I take it, it will increase much faster and to a greater extent under higher temperatures?

The Witness: That's right.

The Court: That is not true in most ordinary types of decay, is it? They won't ordinarily de-

(Testimony of Phillip V. Stay.)

velop under those cool temperatures, or will they?
I don't know.

The Witness: Well, of course, they all develop more rapidly under temperatures of 65 degrees or warmer, but celery, or any commodity leafy in nature, that is shipped under refrigeration in the crates as well as over the top of the load in the car, the temperatures will always be, it is safe to say, below your forties, and decay does develop in a good many types of commodities that are leafy in nature.

The Court: Including celery?

The Witness: Including celery.

The Court: All right.

The Witness: Now, in celery you have this late blight condition, and I presume this is late blight, that is not discernible at shipping point. In other words, all that would be present in the leaves or on the branches would be very small floating bodies that we call ptenidia; they are not, unless they are there in great enough numbers on a given spore, they are not discernible to the eye. [114]

Now, these infections, and the growing of the lesions takes place very rapidly, and when the tissue is broken down, then you have ready entrance for this bacterial soft rot and watery soft rot, which is a secondary condition.

The Court: All right. Go ahead, Mr. Grean.

Q. (By Mr. Grean): I will read you a statement from the United States Department of Agriculture Miscellaneous Publication No. 40, entitled

(Testimony of Phillip V. Stay.)

“Market Diseases of Fruits and Vegetables,” in which it says, in referring to watery soft rot, at page 58:

“Decay may be expected to develop in transit or storage in celery or other vegetable crops harvested from fields in which the sclerotinia disease was an important factor”——

which is referred to as the disease of watery soft rot,

——“even though they appeared to be free of decay at the time of harvest. Each of the species of sclerotinia has wide temperature range for growth and for production of decay. Infection may occur at temperatures as low as 32 degrees to 34 degrees, and as high as 82 degrees, with an optimum 70 degrees to 78 degrees.”

Does that bear out just what you said in regard——

A. That bears out the statement I just made.

Mr. Grean: That is all. [115]

Cross-Examination

By Mr. Haines:

Q. What type of bacteria do you designate this as? What was the origin of that?

A. Well, this bacterial soft rot can be any of the bacterial-carrying bodies, which is the result of a secondary infection. The bacteria is present in the soil and in the water, and in the wash water, and may develop in transit.

(Testimony of Phillip V. Stay.)

Q. Well, is it some type of blight, or does it come from blight?

A. Oh, no; no. This blight that we speak of in California, so far as we know we have two principal types of blight, and one is called Early Blight and one is called Late Blight. They are both fungus, they are not bacteria, and they can cause injury to your healthy tissue under the right atmospheric conditions, and when this fungus breaks down the tissue, then this secondary bacteria can start.

The Court: And cause the rot?

The Witness: And cause the rot.

Q. (By Mr. Haines): This so-called watery soft rot, that is the result of the bacterial condition rather than blight condition; is that your opinion?

A. Well, bacterial ooze or watery soft rot, to the growers and to the trade is commonly known as pink rot, because of its color. It is a field [116] disease.

Q. And that is what was present here, in your opinion, what you call a field disease?

A. Well, yes. Its early inception is in the field. The spores can be on perfectly healthy plants and not be discernible to the eye.

Q. In other words, it comes right out of the ground?

A. It carries in the soil and through water, through the handling of the celery in harvest. For instance, the laborers that you have in the field cutting the celery from its roots, if they handle

(Testimony of Phillip V. Stay.)

stalks that are infected with watery soft rot and they get it on their cutting instrument or on their tools, or on their hands, they can spread that all through the celery. Also, if a plant goes through your washing machine that has watery soft rot, naturally, the spores are spread through your wash water.

Q. Now, suppose that you had a plot of celery consisting of 11 acres, and there was produced from that celery 11 carloads of celery over a period from the second day of December to the 19th day of December. What would your explanation be of why 8 of those 11 carloads were entirely free from this disease you talk about, and 3 of them had the disease? They were all grown in the same plot, they were harvested by the same crew, and go through the same packing shed.

A. Well, insofar as these field diseases are concerned, because of the presence of that disease in the field, it does [117] not mean it is widespread throughout the field. Watery soft rot usually starts in a portion of the field that may be not level, and where the water stands, and also at the ends of the rows, at which you make your turns for your cultivation, and those plants at the ends of the rows are more subject to mechanical injury during the growing process than are the plants in the middle of the field. Therefore, because of the fact that you have watery soft rot in the first row, it does not mean you have watery soft rot on every plant

(Testimony of Phillip V. Stay.)

through that particular row or through the field. It can be spotted, in other words.

Q. Don't you think it rather unusual that you would have a cutting from this same rather small plot—11 acres isn't a very large plot, is it, so far as the vegetable industry is concerned—you had cuttings of 300 crates on the 9th, 450 of the 10th, 20 on the 11th, 365 again on the 11th, 450 on the 12th, 225 on the 12th, and 50 on the 13th, and then we come to the celery that we have here in question, which was cut on the 14th and the 16th. Then we have 200 crates that were cut and processed from the same field and processed in the same packing shed on the 17th; 225 on the 17th; 38 more on the 17th; 8 more on the 17th; 121 on the 18th; 75 more on the 18th; 33 on the 18th; and 5 on the 19th; and in none of those other batches of celery was there any indication of this disease being [118] present.

Mr. Grean: If the court please, we don't know just how long they were in transit.

The Court: And have you got any proof that there was no soft rot found in these other 8 carloads?

Mr. Haines: Our witness testified there was absolutely no complaint in reference to any of the others.

The Court: What relation does that have? Is there any proof whether they were shipped, sold on the local market, or shipped to Los Angeles?

Mr. Haines: Yes. His testimony was that one carload went to the Army, to Chicago, that par-

(Testimony of Phillip V. Stay.)

ticular one, and some went out on the 13th, the very day this agreement was entered into. He testified it takes a day longer to go to Chicago than it does to go to Washington, to Seattle, Washington. The shipments in the other cases were to Cleveland, Omaha, San Diego, Pittsburgh, St. Louis, Omaha, Detroit, Aberdeen, Houston, New York, Chicago, Houston, Los Angeles, Vancouver, San Diego and Los Angeles.

Don't you think it rather peculiar that this one segregation of celery should have this disease when they all had the same origin and the same type of handling?

The Witness: Well, if the others had none, I would say it was out of the ordinary.

Q. (By Mr. Haines): And when you had celery both before and after from the same plot, packed in the same shed by the [119] same crew?

A. Well, may I explain?

Q. Yes, we are asking for an explanation.

A. Well, I don't know. Here, your Honor has asked me to make testimony here. I don't know what the condition was on those other crates that left. Probably they were acceptable, as far as the Army was concerned, in Chicago for the particular purpose they had it there for, and it may have had decay. I can't draw any conclusions.

The Court: Well, he is asking you to assume for argument that the other shipments had none.

The Witness: If the other shipments had none, then I would say it was out of the ordinary.

(Testimony of Phillip V. Stay.)

Q. (By Mr. Haines): Now, have you any other explanation than what you gave as to why this condition existed?

A. No, I don't think I have.

Q. Suppose this trip took one day longer than it normally does to go to Seattle, and suppose during that extra day the doors were left standing open for, say, six or seven hours, would that have affected it?

A. Certainly, it would have affected it, but at that time of the year—wasn't this in December?

Q. Yes.

A. —I doubt whether that would have much effect in that part of the country at that time of the year. It was [120] probably cooler outside than inside the car, maybe in those days. What I mean to say, the outside temperature at that time of the year in that region—

Q. We don't know what the temperature was.

A. No, we don't.

Q. It could have been an unseasonably hot spell.

The Court: That is all speculation.

Mr. Haines: Yes, it is all speculation.

The Witness: That is right.

Q. (By Mr. Haines): You do know, as an inspector, it takes six days ordinarily for goods to travel from Santa Barbara and vicinity to Seattle, do you not?

A. I don't know what the delivery dates are at all by railroad.

Q. What would be the effect upon this celery in

(Testimony of Phillip V. Stay.)

the event that there was a warm condition, if it was tightly sealed in parchment paper, which was non-porous in nature, and each stalk was sealed that way?

A. You want me to comment on that?

Q. Yes.

A. Well, in the first place, your stalks are not tightly sealed. They are open at both ends.

Q. Well, is this true, that they are open at both ends when they are put into a wire crate, such as has been described here, and then the both ends of the parchment [121] which laps over the ends of the stalks are crushed down?

A. Well, it probably won't open to the extent that it would be if it was a single stalk, but the wrapping of the individual parchment does not entirely seal the individual stalk. That is my point. As I said before, I don't know the relative merits of individually wrapping celery and the non-icing of celery, as to its carrying qualities. However, at the time there is considerable purchasing being done which has less ventilation than this parchment wrap that you speak of, and that is called a pliofilm envelope, which has small air holes through the bag, and others are completely sealed, and that is known as a consumer package and is being received quite favorably at the present time under commercial packing. It is done a good deal, and that is far more restrictive, in so far as enclosing the individual stalk is concerned, over your parchment wrap.

Mr. Haines: That is all.

Mr. Grean: Will counsel stipulate that further

testimony from this witness will be substantially the same as to the other two cars with regard to the inspection certificates?

Mr. Haines: Oh, yes; yes.

Mr. Grean: Step down.

The Court: You may step down.

(Witness excused.)

The Court: Are the other witnesses [122] cumulative?

Mr. Grean: Yes. I have other witnesses who were contracting officers at the time in the office and will testify to the use of the purchasing order, if the court wishes testimony on that point.

Mr. Haines: Isn't that a matter of law, your Honor?

The Court: I think so.

Mr. Grean: In that event, the testimony of the other witnesses is cumulative as to the interpretation of the inspection reports, with regard to the government standards.

The Court: All right. That is the defendant's case?

Mr. Grean: That is the defendant's case, your Honor.

The Court: Do you want to summarize your points briefly, or do you want to submit it as is?

Mr. Haines: I think we would prefer to submit it with possibly an opportunity to submit more authorities, particularly on that one point which seems to——

The Court: How much time would you want to submit additional authorities? A week?

Mr. Haines: 10 days, your Honor.

The Court: Can we do it more promptly, so I won't forget about the case before I decide it?

Mr. McIntyre: Certainly. We will do it in any time the court says.

The Court: I don't know whether I will need more authorities after I get through reading your briefs. [123]

Mr. Haines: We would want to submit more authorities on the question of the burden of proof, what happened after the change of position and title.

The Court: May I see the exhibits, Mr. Clerk? I will give you permission to file a limited memorandum on certain topics when I get through discussing this matter.

I am going to take the matter under submission and restudy your memorandums and read some of these cases in more detail. But we have here a case in which the plaintiff is suing upon a contract, a breach of contract, and from the allegations of the complaint there has been alleged an oral understanding and agreement arrived at between the plaintiff and the defendant at Guadalupe, California. The plaintiff has offered no evidence of that oral agreement, although the court gave the plaintiff an opportunity to do so, and it reopened its case.

The court is of the opinion that the law cited by the defendant is correct, namely, that contracts with the government must be in writing or must

come within the other exceptions; that where there is an oral order or requisition, then the purchase order becomes the contract, and, I take it, therefore, that the contracts before the court and, in substance, the contracts sued upon are the contracts, Exhibits G, H, and I, being the purchase orders for the three carloads of celery.

Now, had the plaintiff proved what I understood it [124] contended in some of its arguments, namely, there was one oral agreement reached, and subsequently these purchase orders did not reflect the oral meetings of the minds, we might have a different situation. We do not have that point because there was no proof made of what the oral agreement was, and although the purchase orders, Exhibits G, H, and I, were not typed up until December 21st, long after the celery was shipped, there is no proof before the court that they in any way varied from whatever oral agreement was entered into at the time the oral request was made for bids, and the bids were submitted. I have to assume therefore, that the purchase orders truly reflected the contract between the parties.

We then, I think, have solely questions of law in this case. There is no dispute but what the celery arrived in Seattle in a partially decayed condition. No dispute about that. There is no dispute but that the celery was all right when it was shipped, and the court will make a finding at this time that the celery passed inspection O. K. at Lompoc. The court will also find that the celery did not pass inspection at Seattle, and was rejected.

I think, therefore, we have solely questions of law, as to the meaning of the purchase orders which were the contracts; in other words, what is meant by "delivery F.O.B. origin," and what is meant by that term in connection with "Inspection Points—Inspection and Acceptance at Destination." [125] What is the destination? Seattle? Or is it Camp Richardson, as shown in one of these orders, or is it Camp Ladd, as shown in another, or is it Richardson, Ladd, and Nome, as shown in the third? Or is it Lompoc?

Now, the court is going to find that the government had a right under the purchase order, in the express language of the purchase order, to inspect and accept or reject at destination. I think one of the legal problems is: What is destination? If destination is Lompoc, then the government accepted it, and the government had exercised then its right to inspect and reject, and not having rejected, it was the government's celery. But if "destination" means Seattle, then I think the contract is clear on its face, that it gave the government the right to inspect and accept or reject at Seattle.

Now, it seems to me that is the rather narrow question the thing boils itself down to. The second cause of action I thought first might be of some interest to us, but there is no allegation that the government received the goods. It is not a common count for money had and received.

Mr. Haines: That is correct, your Honor.

The Court: The facts without dispute show the goods were sold by the shipper for the freight

charges, plus a few dollars, I think \$500 in addition.

Mr. Haines: That is correct. [126]

The Court: One other point that may or may not enter into the case is on this matter of the burden of proof, and it depends somewhat on how the court interprets this contract. I am inclined to think that the interpretation of the contract will obviate any discussion of this matter of burden of proof. But if we did get into the burden of proof matter, it seems to me that the plaintiff makes its *prima facie* case by showing that the goods were shipped, were inspected at Lompoc and passed inspection. The government then relies for its defense on the ground that it exercised its right of rejection at Seattle. Having exercised its right of rejection at Seattle, which under that interpretation of the contract it had the right to do, if there was any contention that the government was in bad faith or that the government was at fault in some way, it seems to me the burden shifts again to the plaintiff to prove that issue. There is an implied covenant of good faith, that each party to a contract must exercise its rights in good faith. Now, the government's right to inspection and rejection would not be a right to make a false inspection, would not be a right to say it had inspected when it had not, would not be a right to inspect and reject without cause. But if we ever reach that point in the case, I think clearly the burden of proof is on the plaintiff to go forward, if it says the government has exercised its right to inspection and acceptance, and since the [127] plaintiff has not gone forward with

that proof, the court cannot speculate as to what might have happened, the court can't speculate as to whether any doors might have been open, and the court can't speculate as to whether it stood out in the sun for a day. I think, having talked about it out loud, the thing comes down solely to a question of the interpretation of those three documents. Exhibits G, H, and I, and what they mean on their face.

Mr. McIntyre: May I be heard just a moment on that question of the burden of proof, if the court please?

The Court: Yes.

Mr. McIntyre: Our argument is based on several authorities which hold that an inspection made at destination, where the buyer has employed the shipper, the carrier, and the carrier is acting under the directions and control of the buyer, it is limited to an inspection at destination, but that destination inspection must determine the condition at point of origin, and whether or not there was anything inherent in the shipment at point of origin which existed at that time or existed to an extent that would have caused the damage by the time it reached destination.

Now, I think that applies equally whether the provision of the contract is express or implied. And if it is just an implied provision, it is just as much a contract.

The Court: I will read your cases on that [128] point.

Mr. McIntyre: Yes, sir.

The Court: Although I think under the facts of this case there is no dispute but whatever caused this decay was wrapped up inside of the parchment at the time the celery passed inspection at Lompoc. In other words, I don't think that anybody can contend that something got inside the parchment.

Mr. McIntyre: No. I think the testimony of our witness is that any celery contains spores and germs.

The Court: Which decay.

Mr. McIntyre: Which decay, yes.

The Court: Now, I have tried to narrow down what I think the issues are. I am sympathetic to your position in the sense that I hate to say a person who has grown celery and purportedly sold it to the government should not get his pay. On the other hand, I can see the government's position, that if the celery was to go to Alaska and had been specially wrapped, if it could not send this celery to Alaska, and I am not sure, with that amount of decay at this time——

Mr. McIntyre: We concede it at this time.

The Court: ——so that when it got to Alaska they would have to pump out the bilge to get rid of it.

Mr. McIntyre: That is quite true. Our particular point in wishing to pass this question of the burden of proof is that actually we passed possession and control to the government [129] and we are virtually helpless.

The Court: I will give the plaintiff a week to

submit any authorities it wants to on, say, those three points:

One, what do the contracts mean, Exhibits G, H, and I, which are the only contracts we have;

Two, what about the burden of proof; and,

Three, if it is a different point and not included in the others, did title pass to the government at Lompoc—did the title and risk pass to the government at Lompoc?

Mr. McIntyre: I think it is conceded that title passed, but it is narrower than that, did risk pass?

The Court: Did risk pass at Lompoc?

Mr. McIntyre: I think that is very clear.

The Court: I will give you a week, if you desire to reply, Mr. Grean.

The matter will be submitted.

Mr. Grean: Copies to be served on counsel?

The Court: Oh, yes, between counsel, and an original and a copy to the court. Then if you want to reply after you have seen Mr. Grean's brief, you can have another five days to make your reply.

Now, don't write any briefs if you have covered it here.

Mr. McIntyre: I will not burden the court.

The Court: Don't repeat yourselves on points you have already covered. I will try to read the cases you have already [130] cited and consider them before arriving at a decision. I want to thank you for your expeditious manner in getting this matter disposed of.

Your motion for summary judgment is denied, and I am going to rule on the matter on the merits.

which I think is more satisfactory in this kind of case. [131]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 30th day of April, A.D. 1951.

/s/ MARIE G. ZELLNER,

/s/ SAMUEL GOLDSTEIN,

Official Reporters. ..

[Endorsed]: Filed May 4, 1951. [132]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 56, inclusive, contain the original Complaint; Answer; Stipulation of Facts; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal and Appellant's and Appellee's Designations of Record on Appeal, and a full, true and correct copy of minute order entered March 16, 1951, which, together with original reporter's transcript of proceedings on March 6, 1951, and original plaintiff's Exhibits 1 to 6, inclusive, and original defendant's Exhibits A to M, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23rd day of May, A.D. 1951.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12947. United States Court of Appeals for the Ninth Circuit. California Vegetable Growers, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 24, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 12947

CALIFORNIA VEGETABLE GROWERS, a Cor-
poration,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

A. There is but one point on appeal in this case. It may, however, be stated in different ways.

1. Where title to a perishable commodity passes at origin of shipment and delivery is made at point of origin to the carrier as agent of the buyer by the seller; and at the point of destination the buyer finds the commodity below the specifications of his order, may the buyer reject the shipment where the seller proves the commodity to be in accordance with the order at the point of origin?

2. Where inspection is made by the seller of a perishable commodity at the point of destination of shipment, where the seller delivered the commodity F.O.B. cars at points of origin, and the buyer finds the commodity below the standard ordered and the seller proves delivery F.O.B. cars to be in accordance with the order, upon whom does

the burden of proof devolve to establish the cause of deterioration during shipment?

3. Where the buyer of a perishable commodity, delivered to it F.O.B. cars for distant shipment, inspects the commodity at destination, must the buyer's inspection relate to condition at the date of delivery or at the date of arrival at destination?

B. The facts are not in dispute. Celery was sold to the Army of the United States by plaintiff, the purchase orders called for delivery to defendant F.O.B. cars at Lompoc in Santa Barbara County, California, on private bill of lading to be converted to government bill of lading at destination, Seattle, Washington. The purchase order called for inspection and acceptance at destination. The celery conformed to specifications at point of origin, Lompoc, but had deteriorated by the time it reached Seattle. No adequate explanation was offered by either party for the deterioration on trial of the action. The question to be determined on this appeal is purely one of law. The essential evidence being the purchase orders, the stipulation of facts entered into by the parties and the inspection reports at Lompoc and Seattle respectively.

Dated: May 29, 1951.

SCHAUER, RYON &
McMAHON,

ALFRED D. HAINES,
ROBERT W. McINTYRE,

By /s/ ROBERT W. McINTYRE.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 31, 1951.

